A-186

(3)

No. 97-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

TOMMY DAVID STRICKLER,

Petitioner-Appellant,

v.

RONALD ANGELONE, Director,
Virginia Department of Corrections,

Respondent-Appellee.

On Petition for a Writ of Certiorari to the Court Of Appeals For The Fourth Circuit

APPLICATION FOR A STAY OF EXECUTION

Imminent Execution Scheduled
September 16, 1998

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135 pp

APPLICATION FOR A STAY OF EXECUTION

Pursuant to Supreme Court Rule 23 and 28 U.S.C. sec. 2251, Petitioner Tommy David Strickler moves this Court for a stay of his execution, scheduled for September 16, 1998, pending this Court's disposition of his Petition for a Writ of Certiorari. Mr. Strickler is filing his Petition along with this Application.

Mr. Strickler requests a stay of execution from this Court based on the reasonable probability that four Members of this Court will consider the issues raised in Mr. Strickler's petition sufficiently meritorious for a grant of certiorari, the significant possibility that this Court will reverse the decision below and reinstate the district court decision granting the writ, and the irreparable harm that will occur if his execution is not stayed. See Barefoot v. Estelle, 463 U.S. 880, 895 (1983). Mr. Strickler has already sought a stay of execution from the Court of Appeals for the Fourth Circuit. His application was denied on July 30, 1998.[1]

In his Petition, Mr. Strickler asks this Court to review one issue addressing the state's duty under the Due Process Clause and Brady v. Maryland 373 U.S. 83 (1963), and its progeny, to disclose favorable evidence to the defense:

> Whether the government's duty under the Due Process Clause and Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, to disclose favorable evidence is limited by a due diligence exception imposed on defense counsel. If so, is the due diligence exception applicable only to evidence readily available to the defense in a public forum.

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[1] A copy of the state court Order setting Mr. Strickler's execution date and a copy of the Fourth Circuit's Order denying a stay of execution are appended.

This case raises an issue of critical importance: namely, whether a due diligence exception to the prosecutor's disclosure obligations under Brady is fundamentally inconsistent with this Court's Brady jurisprudence. If such an exception exists, is it properly limited to that evidence known by or fully available to the defense or is it limited to those cases where the defense actually had all the information needed to produce the evidence itself. Nine circuits have recognized such an exception in limited circumstances. Two circuits have explicitly rejected any such exception.

In contrast, the Fourth Circuit has adopted a broad exception that swallows the constitutional rule. In Strickler v. Pruett, No. 97-29 (4th Cir. June 17, 1998), the Fourth Circuit excused the prosecutor's failure to disclose impeachment material on a key prosecution witness held in nonpublic, police files on the grounds that defense counsel failed to make a post-conviction discovery motion, even though defense counsel had no factual or legal basis for such a motion. The Court reached this result while ignoring the state's representations first at trial and then in post-conviction proceedings that all Brady material had been disclosed in the trial prosecutor's "open file." The decision in Strickler was not an aberration but was the logical extension of the Court's progressive retreat from Brady set out in Epperly v. Booker, 997 F.2d 1 (4th Cir. 1993), Barnes v. Thompson, 58 F.3d 971 (4th Cir. 1995), and Hoke v. Netherland, 92 F.3d 1350 (4th Cir. 1996). Unlike those cases, however, the evidence in Strickler's case was

never available to defense counsel, and thus not discoverable, in any public forum.

The Fourth Circuit's decision is contrary to this Court's decisions in Brady, Kyles v. Whitley, 115 S. Ct. 1555 (1995), and United States v. Bagley, 473 U.S. 667 (1985). The decision of the Fourth Circuit conflicts sharply with the decisions of every other circuit interpreting Brady in light of any due diligence exception. It also conflicts with this Court's long established decisions on procedural default. Dobbs v. Zant, 113 S. Ct. 835 (1993); Coleman v. Thompson, 501 U.S. 722 (1991); Amadeo v. Zant, 486 U.S. 214 (1988).

In sum, review by this Court is required to resolve the sharp split among the lower courts regarding the duties and obligations of the government under Brady and its progeny. The issue posed in Mr. Strickler's case is of great significance to the fair and uniform administration of criminal prosecutions, both capital and noncapital, throughout the United States. For these reasons and those set forth in the pending petition for certiorari, there is a significant possibility that this Court would reverse the decision below.

The final factor for the Court to consider is whether irreparable harm is likely to result if the decision is not stayed. Mr. Strickler will die on September 16, 1998 -- just 64 days after the Court of Appeals on July 14, 1998, denied rehearing on his first habeas petition -- unless the Court grants a stay of execution. Because the proceedings have been expedited by the

Commonwealth, Mr. Strickler's imminent execution date will prevent this Court from considering Mr. Strickler's petition with the level of care that would have been possible but for the Commonwealth's rush to execute Mr. Strickler.

Mr. Strickler objected below that the proposed date unfairly truncated his time to seek relief from the U.S. Supreme Court and directed the courts' attention to Breard v. Angelone, 118 S. Ct. 1352 (April 18, 1998), discussed below. Respondent maintained that any relief in the form of a stay must come from this Court. The state circuit court entered an Order setting the execution as requested. The setting of a September date deprives Mr. Strickler of nearly one-third of the time allowed by the United States Supreme Court Rules to prepare and present a petition for a writ of certiorari. In this abbreviated time, not only must Mr. Strickler prepare and present a petition for writ of certiorari, but the Justices of this Court must review, consider, and rule on the issues therein. By setting this date, the State seeks to unfairly disadvantage Mr. Strickler and this Court in their abilities to adequately present and consider his claims from a first federal habeas petition by denying him the time which this Court has established as appropriate for those proceedings.

Most recently, in Breard v. Angelone, 118 S. Ct. 1352 (April 14, 1998), three Justices wrote individually to express their displeasure with the Commonwealth's practice:

> The Court of Appeals' decision denying petitioner's first application for a federal writ of habeas corpus became final on February 18, 1998. Under this Court's Rules, a timely petition for a writ of certiorari to

> review that decision could have been filed as late as May 19, 1998. See Rule 13.1 ("[A] petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by . . . a United States court of appeals . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment"). Ordinary review of that petition pursuant to our Rules would have given us additional time thereafter to consider its merits in the light of the response filed by the Commonwealth of Virginia. We have, however, been deprived of the normal time for considered deliberation by the Commonwealth's decision to set the date of petitioner's execution for today. There is no compelling reason for refusing to follow the procedures that we have adopted for the orderly disposition of noncapital cases.

Id. at 1356-57 (Stevens, J., dissenting from denial of certiorari).

> [A]s Justice Stevens points out, Virginia is now pursuing an execution schedule that leaves less time for argument and for Court consideration than the Court's rules provide for ordinary cases. Like Justice Stevens, I can find no special reason here to truncate the period of time that the Court's rules would otherwise make available.

Id. at 1357 (Breyer, J., dissenting from denial of certiorari).

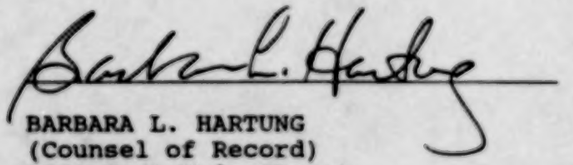
> I would grant the application for a stay of execution in order to consider in the ordinary course the instant petition, Breard's first federal petition for writ of habeas corpus.

Id. (Ginsburg, J., dissenting from denial of certiorari).

In order to give this Court the appropriate time to provide considered deliberation of the issues presented, the stay of execution should be granted to provide the Justices of this Court sufficient time to consider a petition for writ of certiorari on Mr. Strickler's first federal habeas corpus petition in this capital case.

WHEREFORE, for the reasons stated above and in his Petition for a Writ of Certiorari, Tommy David Strickler respectfully moves for a stay of his execution currently set for September 16, 1998.

Respectfully submitted,



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Counsel for Petitioner
Tommy David Strickler

August 31, 1998

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

COMMONWEALTH OF VIRGINIA,

v.

TOMMY DAVID STRICKLER,

Defendant.

ORDER

Pursuant to Section 53.1-232.1 of the Code of Virginia, having determined that the United States Court of Appeals for the Fourth Circuit has denied habeas corpus relief to the defendant, this Court hereby ORDERS that the death sentence of Tommy David Strickler be carried out on the 16th day of September, 1998, at such a time of day as the Director of the Department of Corrections shall fix.

It is further ORDERED that at least ten (10) days before September 16, 1998, the Director shall cause a copy of this Order to be delivered to the defendant and, if the defendant is unable to read it, cause it to be explained to him. The Director shall make return thereof to the Clerk of this Court.

The Clerk is directed to promptly furnish certified copies of this Order to the following persons:

Ronald J. Angelone, Director
Virginia Department of Corrections
P.O. Box 26963
6900 Atmore Drive
Richmond, Virginia 23261

The Honorable Lee Ervin
Commonwealth's Attorney
Augusta County
6 East Johnson, 3rd Floor
Staunton, Virginia 24401-4303

Barbara Hartung, Esquire
1001 East Main Street, Suite 504
Richmond, Virginia 23219

Pamela A. Rumpz
Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Entered this 23 day of July, 1998.

H H Wood
Judge

I ask for this:

Lee Ervin by John Reed ACA
Commonwealth's Attorney

Seen and objected to:

Barbara L. Hartung
Barbara Hartung
Counsel for Defendant 7/23/98

A True and Correct Copy,
Teste: Margaret R. Barbour Dep Clerk
Circuit Court
County of Augusta, Virginia

FILED: July 30, 1998

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 97-29(L)
(CA-95-924-3)

TOMMY DAVID STRICKLER,

Petitioner - Appellee,

versus

FRED W. GREENE, Warden, Mecklenburg Correctional Center,

Respondent - Appellant.

ORDER

Petitioner has filed a motion for stay of the mandate and for a stay of execution and respondent filed a response in opposition to the motion.

The Court denies petitioner's motion for stay of the mandate and for a stay of execution.

Entered at the direction of Judge Hamilton with the concurrence of Judge Niemeyer and Judge Luttig.

For the Court

/s/ Patricia S. Connor
Clerk

CERTIFICATION

I hereby certify that two copies of the enclosed Application For A Stay Of Execution were served by hand on counsel for Respondent, Pamela Rumpz, Assistant Attorney General, Office of the Attorney General, 900 E. Main Street, Richmond, VA 23219 on Sept. 1, 1998.

BARBARA L. HARTUNG

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
July 14, 1998

No. 97-29
CA-95-924-3

TOMMY DAVID STRICKLER

Petitioner - Appellee

v.

FRED W. GREENE, Warden, Mecklenburg Correctional Center

Respondent - Appellant

No. 97-30
CA-95-924-3

TOMMY DAVID STRICKLER

Petitioner - Appellant

v.

FRED W. GREENE, Warden, Mecklenburg Correctional Center

Respondent - Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellee/cross-appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

FILED: July 30, 1998

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 97-29(L)
(CA-95-924-3)

TOMMY DAVID STRICKLER,

Petitioner - Appellee,

versus

FRED W. GREENE, Warden, Mecklenburg Correctional Center,

Respondent - Appellant.

ORDER

Petitioner has filed a motion for stay of the mandate and for a stay of execution and respondent filed a response in opposition to the motion.

The Court denies petitioner's motion for stay of the mandate and for a stay of execution.

Entered at the direction of Judge Hamilton with the concurrence of Judge Niemeyer and Judge Luttig.

For the Court

/s/ Patricia S. Connor
Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

TOMMY DAVID STRICKLER,
Petitioner-Appellee,

v.

SAMUEL V. PRUETT, Warden,
Mecklenburg Correctional Center,
Respondent-Appellant.

No. 97-29

TOMMY DAVID STRICKLER,
Petitioner-Appellant,

v.

SAMUEL V. PRUETT, Warden,
Mecklenburg Correctional Center,
Respondent-Appellee.

No. 97-30

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond.
Robert R. Merhige, Jr., Senior District Judge.
(CA-95-924-3)

Argued: March 6, 1998

Decided: June 17, 1998

Before NIEMEYER, HAMILTON, and LUTTIG, Circuit Judges.

Affirmed in part, vacated in part, and remanded with instructions by unpublished per curiam opinion. Judge Luttig wrote a separate statement.

COUNSEL

ARGUED: Pamela Anne Rumpz, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellant. Barbara Lynn Hartung, Richmond, Virginia, for Appellee. **ON BRIEF:** Richard Cullen, Attorney General of Virginia, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellant. Mark E. Olive, VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER, Richmond, Virginia, for Appellee.

OPINION

PER CURIAM:

The petitioner, Tommy David Strickler, applied for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia following his conviction and death sentence for capital murder in the Circuit Court of Augusta County, Virginia. *See* 28 U.S.C. § 2254.[1] The district court granted the writ, reasoning that Strickler's rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated when the prosecutor failed to disclose certain evidence at trial. The Commonwealth of Virginia (the Commonwealth), acting through one of its wardens, appeals this ruling. In his cross-appeal, Strickler appeals the district court's dismissal of his claim that the Virginia Supreme Court's proportionality review of his death sentence was constitutionally deficient. Although the district court correctly dismissed Strickler's proportionality review claim, the district court erred when it granted Strickler relief under *Brady*. Accordingly, we affirm in part, vacate in part, and remand with instructions to dismiss the petition.

[1]Because Strickler's petition for writ of habeas corpus was filed prior to the April 24, 1996 enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214, the Chapter 153 amendments of the AEDPA do not apply in this case. *See Lindh v. Murphy*, 117 S. Ct. 2059, 2068 (1997) (holding that the Chapter 153 amendments, amendments applying to all federal habeas petitions, do not apply to federal habeas petitions pending on the date of the AEDPA's enactment). As to the Chapter 154 amendments, amendments applying to capital petitioners, we need not decide whether these amendments apply in this case because Strickler's claims are either procedurally defaulted or meritless under the more lenient pre-existing standards. Indeed, we are confident the AEDPA is of no help to Strickler.

I

In 1990, Strickler was convicted of, *inter alia*, the capital murder of Leanne Whitlock. As recounted by the Virginia Supreme Court on direct appeal, the facts surrounding Whitlock's murder are:

> On January 5, 1990, Leanne Whitlock (Leanne), a sophomore at James Madison University, borrowed a 1986 Mercury Lynx from her boyfriend, who worked at the Valley Mall in Harrisonburg. The car was clean at the time. Leanne left the Mall at 4:30 p.m. and, with her roommate, Sonja Lamb, drove to a store, where Leanne had a part-time job, to pick up a paycheck. Leanne dropped Sonja off about 6:45 p.m. and left, alone, to return the borrowed car to her boyfriend.
>
> Anne Stolzfus was in a store at Valley Mall with her daughter at 6:00 p.m. when Strickler, Ronald Henderson, and a blond woman entered. Strickler was behaving in such a loud, rude, and boisterous manner that she watched him with some apprehension. He was dressed in casual, but clean, clothing.
>
> As Mrs. Stolzfus was leaving the mall soon thereafter, she saw Leanne Whitlock driving the blue Mercury. Suddenly, Strickler ran out of the mall and addressed the occupant of a nearby van, angrily pounding on the van's door. Strickler also ran up to the occupants of a pick-up truck. He then turned to the Mercury that Leanne was driving, which was stopped in traffic, and pounded on the passenger side win-

dow. Leanne leaned over as if to lock the door, but Strickler wrenched the door open and jumped into the car, facing Leanne. She appeared to try to push him away, but he opened the door and beckoned Henderson and the blond woman to join him.

Leanne accelerated and began sounding blasts on the horn. Strickler struck her repeatedly and she ceased to sound the horn and stopped the car. Henderson and the blond woman entered the back seat. Mrs. Stolzfus came up to the car and asked, three times, "are you O.K.?" Leanne seemed "totally frozen." She drove the Mercury away very slowly, and mouthed the word, "help." The Mercury headed east on Route 33, toward Elkton. Mrs. Stolzfus' daughter wrote down its license number, West Virginia NKA 243.

About 7:30 p.m., Kurt D. Massie and a friend were driving north on Route 340 near Stuarts Draft. They saw a dirty blue car, southbound, turn off and drive into a field. Strickler was the driver, a white woman was in the front seat with him,[3] and another man was in the back seat. Massie thought he saw a fourth occupant in the car.

Between 9:00 and 9:15 p.m., Strickler and Henderson walked into Dice's Inn in Staunton. Strickler was wearing blue jeans which were dirty, bloody, and had a burn mark on them. He gave a wristwatch, later identified as the property of Leanne Whitlock, to a girl named Nancy Simmons.

At 12:30 or 1:00 a.m., Strickler left Dice's Inn with Henderson and a girl named Donna Tudor. The three entered a dirty blue Mercury. Henderson drove the car and Strickler sat in the back seat with Donna. Strickler told her he had bought the car from a man for $500. He also said that he had been in a fight and had injured his knuckle, which appeared to be lacerated. Strickler and Henderson discussed a "fight" they had had with "it," describing "it" with a racial epithet.

[3]Leanne was black.

Strickler said they had kicked "it" in the back of the head and had used a "rock crusher." He said "it" would give them no more trouble. Strickler was calm during this conversation, but Henderson seemed nervous and kept looking over his shoulder at them. The three drove to Harrisonburg to purchase drugs. During the ride, Henderson nearly collided head on with an approaching car, and Strickler drew a knife and threatened to stab him.

After dropping Henderson off in Harrisonburg, Donna Tudor went to Virginia Beach with Strickler in the blue Mercury. The two stayed nearly a week, during which time Donna saw Leanne Whitlock's driver's license, identification card, and bank card in the car. Strickler tried to use the bank card in Virginia Beach, and gave Donna a pair of earrings which Leanne had worn on the night of January 5.

Several days later, Donna and Strickler returned to Strickler's mother's home in New Market. Strickler's mother washed his blood-stained blue jeans and his shirt.

Strickler told Donna to hide Leanne's three identification cards in a bag with his T-shirt and other clothing. She deposited these items in an abandoned car near Strickler's stepfather's house, but later led police to them.

On January 10 or 11, Donna and Strickler abandoned the blue Mercury near a church. Angry after an argument with Donna, Strickler cut up the interior of the car with his hunting knife and also jumped on the car's roof, leaving his footprints.

On January 13, Henderson's frozen wallet was found in the cornfield into which Kurt Massie had seen Strickler drive the blue Mercury on January 5. Later that day, police searched the field and found Leanne's frozen clothing in a pile near the place Henderson's wallet had been found. Leanne's nude, frozen body was found in a nearby wooded area, 300 feet from the highway, buried under two logs and

covered with leaves which had been deliberately packed around the logs.

Leanne's hands were extended over her head and crossed at the wrists. She had been dragged by the feet over the ground face down at or shortly after the time of her death, leaving long linear scratches on her upper body. There were lacerations and abrasions on the face, neck, and thighs, some consistent with kicking. Death was caused by four large, crushing, depressed skull fractures with lacerations of the brain. Brain tissue had exuded from the left front of the skull, and bone fragments were imbedded in the brain. Any one of the fractures could have been fatal, but death was not instantaneous.

Near the body, the police found a large rock, weighing 69 pounds, 4 ounces, which was stained with human blood in two places. Despite the very cold weather, the rock was not frozen to the ground.

Beside the rock, there were two indentations in the frozen ground, one four inches deep, the other less. Each indentation contained blood of Leanne's blood type, as well as human hair consistent with Leanne's in all respects. Human hairs were also found on Leanne's frozen clothing. They were Caucasian in origin, and matched Strickler's hair in all respects. Some of them had evidently been torn out of his head by the roots.

Two of the shoe impressions on the roof of the Mercury matched a shoe Strickler was wearing when he was arrested on January 11. Eighteen of his fingerprints, and nine of Donna Tudor's, were identified in the car. A jacket with Henderson's identification was found in the car. It bore at least four human blood stains. The shirt Strickler had been wearing on January 5 was recovered from the brown bag Donna had hidden. It bore stains from semen consistent with Strickler's, as well as human blood stains. Vaginal swabs taken from Leanne's body also showed the presence of semen, but its type was not identified.

Strickler v. Commonwealth, 404 S.E.2d 227, 230-32 (Va. 1991).

On February 27, 1990, Strickler was charged with grand larceny, robbery, and abduction in Rockingham County.[3] That same day, Strickler was indicted by an Augusta County grand jury for the robbery and abduction of Whitlock.[4] On April 23, 1990, Strickler was indicted by an Augusta County grand jury for the capital murder of Whitlock. Following a jury trial in Augusta County Circuit Court, Strickler was convicted of all three charges. The jury fixed Strickler's punishment at life imprisonment for the robbery and abduction convictions. In the bifurcated proceeding, the jury heard evidence in aggravation and mitigation of the capital murder conviction. Based upon findings of Strickler's future dangerousness and the vileness of the crime, the jury fixed Strickler's sentence at death. The trial court sentenced Strickler in accordance with the jury's verdicts.

Strickler appealed his convictions and sentences to the Virginia Supreme Court, and that court affirmed. *See Strickler v. Commonwealth*, 404 S.E.2d 227 (Va. 1991). On November 4, 1991, the Supreme Court of the United States denied Strickler's petition for writ of certiorari. *See Strickler v. Virginia*, 502 U.S. 944 (1991).

Strickler then sought state collateral relief in the Circuit Court for Augusta County. In September 1993, the circuit court dismissed Strickler's state habeas petition. The Virginia Supreme Court granted a limited appeal to address whether: (1) the state habeas court erred in refusing to vacate Strickler's capital murder conviction because of an erroneous capital murder jury instruction; and (2) his trial counsels' failure to object to the capital murder jury instruction rendered his trial counsels' performance constitutionally ineffective. The Virginia Supreme Court found the former claim procedurally defaulted under state law. *See Strickler v. Murray*, 452 S.E.2d 648, 651 (Va. 1995). As to the latter claim, the court found that Strickler was not prejudiced by the erroneous capital murder instruction and, therefore, failed to meet his burden of showing that, but for trial counsels' error,

[3]Whitlock was abducted in Rockingham County, but murdered in Augusta County.

[4]As a result of the charges brought in Augusta County, the Rockingham charges were *nolle prosequi*.

the result of the proceeding would have been different. *See id.* at 652-53. On October 2, 1995, the Supreme Court of the United States denied Strickler's petition for writ of certiorari. *See Strickler v. Angelone*, 516 U.S. 850 (1995).

On March 5, 1996, Strickler filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Virginia. On May 20, 1996, Strickler filed an amended petition. On January 16, 1997, the district court dismissed, among other claims, Strickler's claim concerning the Virginia Supreme Court's proportionality review of his death sentence.

Following discovery, Strickler moved for summary judgment on his *Brady* claim. In response, the Commonwealth filed a cross motion for summary judgment. On October 15, 1997, the district court granted Strickler's motion for summary judgment and denied the Commonwealth's cross-motion for summary judgment. The district court held that Strickler's constitutional rights were violated by the prosecutor's failure to disclose certain evidence at trial. The Commonwealth moved for a stay of the district court's judgment pending appeal, which the district court granted. Both Strickler and the Commonwealth noted timely appeals.

II

In the district court, Strickler contended that statements and letters written by Anne Stolzfus, a Commonwealth witness, as well as police reports contained in the Harrisonburg Police Department files,[5] contained exculpatory evidence which was required to be disclosed under *Brady*. The parties refer to this evidence as "the Stolzfus materials," and these materials appear as Exhibits one through eight to an affidavit submitted in the district court by William Bobbitt, Jr., one of Strickler's trial counsel. The district court concluded that Strickler's rights were violated under *Brady* and issued the writ on that basis.

For two reasons, the Commonwealth contends the district court erred in issuing the writ. First, the Commonwealth contends that the

[5]Harrisonburg is located in Rockingham County.

Brady claim is procedurally defaulted and that Strickler has not established cause and prejudice to excuse the procedural default. Second, the Commonwealth contends that Strickler's *Brady* claim fails on the merits.

Strickler's *Brady* claim was never presented to the Virginia state courts. Strickler's failure to raise the claim in state court brings into play the doctrines of exhaustion and procedural default.

In the interest of giving the state courts the first opportunity to consider alleged constitutional errors occurring in a state prisoner's trial and sentencing, a state prisoner must exhaust all available state remedies before he can apply for federal habeas relief. *See Matthews v. Evatt*, 105 F.3d 907, 910-11 (4th Cir.), *cert. denied*, 118 S. Ct. 102 (1997); *see also* 28 U.S.C. § 2254(b). To exhaust state remedies, a habeas petitioner must fairly present the substance of his claim to the state's highest court. *See Matthews*, 105 F.3d at 911. The exhaustion requirement is not satisfied if the petitioner presents new legal theories or factual claims for the first time in his federal habeas petition. *See id.* The burden of proving that a claim is exhausted lies with the habeas petitioner. *See Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994).

A distinct but related limit on the scope of federal habeas review is the doctrine of procedural default. If a state court clearly and expressly bases its dismissal of a habeas petitioner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, the habeas petitioner has procedurally defaulted his federal habeas claim. *See Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). A procedural default also occurs when a habeas petitioner fails to exhaust available state remedies and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Id.* at 735 n.1. We may excuse a procedural default if the petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[ ] will result in a fundamental miscarriage of justice." *Id.* at 750.[6]

[6]Before this court, Strickler has not attempted to establish that our refusal to address his *Brady* claim would result in a "miscarriage of justice." Accordingly, we do not address the "miscarriage of justice" exception.

Under Virginia law, "a petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known or available to petitioner at the time of his original petition." *Hoke v. Netherland*, 92 F.3d 1350, 1354 n.1 (4th Cir.) (internal quotes omitted), *cert. denied*, 117 S. Ct. 630 (1996); Va. Code Ann. § 8.01-654(B)(2) ("No writ [of habeas corpus ad subjeciendum] shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition."). Thus, resolution of the question of whether Strickler's *Brady* claim is procedurally defaulted turns on whether the factual basis of Strickler's *Brady* claim was available to him at the time he filed his state habeas petition.

We begin our discussion with a summary of the facts surrounding Strickler's *Brady* claim. Prior to trial, Detective Dan Claytor of the Harrisonburg Police Department interviewed Stolzfus on approximately five occasions. Detective Claytor took notes during, and typed reports of, his interviews with Stolzfus and received letters and "summaries" from Stolzfus. These documents, referred to by the parties as the "Stolzfus materials," were kept in Harrisonburg Police Department files.

On the day before trial, an article appeared in the Roanoke Times containing an interview with an unidentified prosecution witness, obviously Stolzfus. In the interview, Stolzfus summarized the circumstances surrounding Whitlock's abduction. This summary tracked her eventual trial testimony and also revealed a fact not contained in her trial testimony: that she had contacted Whitlock's boyfriend and viewed photographs of Whitlock.

At trial, Stolzfus testified that she was interviewed by Detective Claytor on several occasions and described Whitlock's abduction to a reporter from the Roanoke Times approximately one week prior to the trial. Stolzfus also testified that she had identified Strickler in a photo line-up.

As to the circumstances surrounding Whitlock's abduction, Stolzfus testified that on January 5, 1990, she went to the Valley Mall in Harrisonburg with her daughter. Around 6:00 p.m., they entered the Music Land store where she saw two men and a blond woman. One of the men was "revved up" and impatient. She described the physical

features of the three and their clothing. After Stolzfus left the store, she again encountered the trio inside the Valley Mall and spoke briefly to the woman. Shortly thereafter, Stolzfus and her daughter got into their car and stopped in the Valley Mall parking lot when a car came by. The driver was a black woman. Stolzfus described her as a "rich college kid," "beautiful," "well dressed," "happy," "singing," and "bright eyed." Stolzfus testified she got a good look at her and identified the driver as Whitlock.

Whitlock pulled in front of Stolzfus and stopped for traffic. The "revved up" man from the music store, whom Stolzfus later identified as Strickler, came out of the Valley Mall and banged on vehicles in front of Whitlock's car. He then pounded on Whitlock's passenger side window, yanked the car door open, and sat facing her. She tried to push him away. The second man and the blond woman, seen earlier in the Valley Mall, tried to enter the car also. Whitlock accelerated and "laid on the horn." Strickler hit Whitlock repeatedly on her shoulder and head. When the car stopped, Strickler opened the passenger door, and the other two got into the backseat. The second man, later identified as Henderson, handed his coat to Strickler who put it on the floor and "fiddled with it [for] what seemed like a long time."

Stolzfus pulled parallel to Whitlock's car, got out, and walked over to look. Henderson "laid over on the seat to hide from" Stolzfus. Stolzfus returned to her car, faced Whitlock, and then asked her three times "are you O.K." Each time Whitlock looked at Stolzfus and then down to her right. Whitlock mouthed a word that Stolzfus did not understand. She then realized that Whitlock had said "help." Stolzfus pulled away and told her daughter to go inside the Valley Mall and get security. The daughter refused. Whitlock drove past Stolzfus very slowly, "went up over the curb . . . so the car really tilted," and "laid on the horn again." Stolzfus told her daughter to write the license number down on an index card. Stolzfus remembered the plate, West Virginia NKA 243, with a trick, "No Kids Alone 243."[7]

[7]For reasons not entirely clear from the record, Stolzfus did not report the incident to law enforcement. However, the record does reflect that Stolzfus was approached by Detective Claytor after she had told a fellow classmate at James Madison University about the January 5, 1990 incident and her classmate informed law enforcement.

On state habeas, Strickler did assert an ineffective assistance of counsel claim based on counsels' failure to file a *Brady* motion, although it is unclear from the record what formed the factual basis for this claim. The Commonwealth opposed the motion on the basis that Strickler received all *Brady* material through the prosecutor's open file policy. However, Strickler did not request to examine the police files of the Harrisonburg Police Department, notwithstanding Stolzfus' trial testimony that she was interviewed by Detective Claytor on several occasions and Virginia Supreme Court Rule 4:1(b)(5) which allows, with prior leave of court, discovery on all relevant matters that are not privileged.

On federal habeas, Strickler served interrogatories and subpoenaed documents from various police and prosecution files. Pursuant to a subpoena, Strickler obtained the Stolzfus materials from the Harrisonburg Police Department files. Pursuant to another subpoena, Strickler obtained all materials concerning Stolzfus in the current custody of the Augusta County Commonwealth's attorney's office. The prosecutor's file contained Exhibits two, seven, and eight, but did not contain Exhibits one and three through six.[6]

[6]There is a dispute between the parties concerning which exhibits were disclosed to Strickler prior to trial. In response to Strickler's interrogatories, Lee Ervin, the prosecutor in Strickler's case, stated that he reviewed only Exhibits two, seven, and eight and had never reviewed Exhibits one and three through six prior to Strickler's trial. Ervin also stated that Exhibits two, seven, and eight were in his prosecution file and were disclosed to defense counsel pursuant to the open file policy. Bobbitt stated in his affidavit that he had never seen any of the Stolzfus materials prior to, or during, Strickler's trial, notwithstanding the open file policy. Similarly, Humes J. Franklin, Jr., Henderson's trial counsel, stated in his affidavit that he had no recollection of seeing any of the Stolzfus materials in Ervin's files. However, Thomas Roberts, Strickler's other trial counsel, stated in his affidavit that, although he could not recall if he had seen the Stolzfus materials, he did recall the "information contained in them." Roberts also stated that he had discussed with Bobbitt the "possibility that Ms. Stolzfus may not be a credible witness because she had not come forward immediately and her story had become much more detailed over time." According to Roberts, "[i]t seemed too good to be true." The district court never resolved this dispute because the district court concluded that even if Exhibits two, seven, and eight were disclosed to Strickler, his rights under *Brady* were violated. We need not decide this factual dispute because, as discussed *infra*, Strickler's *Brady* claim is procedurally defaulted; Strickler has not established cause and prejudice to excuse the default; and the claim is, in any event, without merit.

As noted above, the Stolzfus materials appear as Exhibits one through eight to an affidavit submitted in the district court by Bobbitt. Exhibit one is a one-page document containing Detective Claytor's hand-written notes of his initial January 19, 1990 interview with Stolzfus. The notes reveal that Stolzfus could not identify Whitlock; could identify the blond woman; and indicated that Henderson was tall, had black hair, and wore a cream colored jacket. Exhibit two is a six-page, typed report of Detective's Claytor's interviews with Stolzfus on January 19 and 22, 1990. The report contains a detailed summary of Stolzfus' account of Whitlock's abduction. However, Detective Claytor's report notes that Stolzfus was not sure if she could identify Strickler and Henderson, although Stolzfus indicated she might if she saw Strickler and Henderson in person. Exhibit two also notes that Stolzfus was taken to the police impound lot on January 24, 1990, and shown the car Whitlock had been driving. According to the report, the next day Stolzfus advised police that she now recalled the license number, NKA 243, and "had made up a code to help remember the license number after the incident, 'No Kids After 243.'"

Exhibit three entitled "Observations" was given to Detective Claytor by Stolzfus on January 19, 1990, at 1:00 p.m. In this exhibit, Stolzfus describes the abduction with a set of diagrams.

Exhibit four is a typed letter, dated January 22, 1990, to Detective Claytor signed by Stolzfus. In this letter, Stolzfus explains that although she did not initially remember being at the Valley Mall on the evening Whitlock was abducted, her memory was "jogged" when her daughter reminded her of a small purchase at a shop in the Valley Mall. In this exhibit, Stolzfus also explains that she was uncertain about portions of the events she witnessed the evening of Whitlock's abduction:

> I have a very vague memory that I'm not sure of. It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. I have impressions of intense anger, of his going back to where the dark haired guy and girl were standing. Then the guy I saw came running up to the black girl's window? Were those 2 memories the same person? . . .

Exhibit five is an undated, typed document entitled "Notes for Detective Claytor: My Impressions of the Car." In this exhibit, Stolzfus gives a description of the car driven by Whitlock, but does not mention the license plate or the license plate number.

Exhibit six is a hand-written note to Detective Claytor from Stolzfus dated January 25, 1990, 1:45 a.m. In this note, Stolzfus reports that she spent several hours with Whitlock's boyfriend viewing photographs and was certain Whitlock was the black girl she saw on January 5, 1990.

Exhibit seven is a typed two-page letter dated January 26, 1990, to Detective Claytor and signed by Stolzfus. This letter contains a description of Stolzfus' encounter with Strickler, Henderson, and the blond woman at the music store in the Valley Mall.

Exhibit eight is a three-page, typed document, undated and signed by Stolzfus. The document is entitled "Details of Encounter with Mountain Man, Shy Guy and Blond Girl." This exhibit contains a detailed description of Stolzfus' encounter with Strickler, Henderson, and the blond woman in the Valley Mall and of Whitlock's abduction. The summary of Whitlock's abduction in this exhibit essentially mirrors her trial testimony and the facts set forth in the Roanoke Times article.[9]

We are of the opinion that the factual basis of Strickler's *Brady* claim was available to him at the time he filed his state habeas petition and, therefore, the *Brady* claim is procedurally defaulted under the authority of *Hoke* and Va. Code Ann. § 8.01-654(B)(2). Strickler,

[9]The Roanoke Times article was produced by the Commonwealth as an exhibit in its cross-motion for summary judgment.

of course, knew that Stolzfus was interviewed by Detective Claytor on several occasions and had identified Strickler in a photo line-up. In light of these facts, reasonably competent counsel would have sought discovery in state court in order to examine the Harrisonburg Police Department files concerning Stolzfus' statements to Detective Claytor. Upon such a simple request, it is likely the state court would have ordered the production of the files. In other words, in state court, Strickler could have followed a procedure similar to the one he followed in federal court: Strickler could have filed a discovery motion seeking to review the Harrisonburg police files, *see* Va. S. Ct. Rule 4:1(b)(5) (extending discovery, with prior leave of court, to all matters that are relevant and not privileged). His failure to do so results in a procedural default of his *Brady* claim.

Having concluded that Strickler's *Brady* claim would be procedurally defaulted if he attempted to raise it in state court at this time, we can only address Strickler's *Brady* claim if he can demonstrate cause and actual prejudice. *See Coleman*, 501 U.S. at 750. Objective factors that constitute cause include "'interference by officials' that makes compliance with the State's procedural rule impracticable, and 'a showing that the factual or legal basis for a claim was not reasonably available to counsel.'" *McClesky v. Zant*, 499 U.S. 467, 493-94 (1991) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)); *see also Clanton v. Muncy*, 845 F.2d 1238, 1241 (4th Cir. 1988). Additionally, the novelty of a claim has been held to constitute cause. *See Reed v. Ross*, 468 U.S. 1, 12-16 (1984); *see also Dugger v. Adams*, 489 U.S. 401, 407 (1989) (stating that cause may be established upon demonstration that a constitutional claim is "so novel that its legal basis is not reasonably available to counsel"). Finally, a petitioner may establish cause by showing he received constitutionally ineffective assistance of counsel. *See Coleman*, 501 U.S. at 753; *Murray*, 477 U.S. at 488.[10]

[10]Generally, "a claim of ineffective assistance [must] be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Murray*, 477 U.S. at 489; *see also Pruett v. Thompson*, 996 F.2d 1560, 1570 (4th Cir. 1993). This is so because allowing a petitioner to raise a claim of ineffective assistance of counsel for the first time on federal habeas review in order to show cause for a procedural default would place the federal habeas court "in the

Strickler asserts that the factual basis for his *Brady* claim was unavailable to him at the time he filed his state habeas petition and, therefore, he has established cause for the procedural default. But, as noted above, Strickler's *Brady* claim was available to him in state court through the exercise of reasonable diligence. As such, he cannot establish cause based upon the unavailability of the *Brady* claim. *See Stockton v. Murray*, 41 F.3d 920, 925 (4th Cir. 1994) ("Even if [the petitioner] had not actually raised or known of the claims previously, he still cannot establish cause to excuse his default if he should have known of such claims through the exercise of reasonable diligence.").

Strickler also argues that his trial counsel were constitutionally ineffective for failing to make a *Brady* motion at trial. If attorney error amounts to constitutionally ineffective assistance of counsel under the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984), the Sixth Amendment dictates that the attorney's error must be imputed to the state. *See Coleman*, 501 U.S. at 754. Accordingly, Strickler may establish cause to excuse his procedural default by showing trial counsel error that satisfies the standard set forth in *Strickland*. *See id.* at 752. Under *Strickland*, a defendant is deprived of the assistance of counsel guaranteed by the Constitution when counsel's performance falls "below an objective standard of reasonableness" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694.

In this case, Strickler's trial counsels' action did not fall below an objective standard of reasonableness. In light of the prosecutor's open file policy, trial counsel were under no obligation to file a *Brady* motion. *Cf. Smith v. Maggio*, 696 F.2d 365, 367 (5th Cir. 1983) ("Counsel had no duty to file pre-trial motions, because the prosecutor established an open file policy that made filing of discovery motions or *Brady* requests pointless.").

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anomalous position of adjudicating an unexhausted constitutional claim for which state court review might still be available" in contravention of "[t]he principle of comity that underlies the exhaustion doctrine." *Murray*, 477 U.S. at 489. Strickler has satisfied this requirement by presenting an ineffective assistance of counsel claim based on trial counsels' failure to file a *Brady* motion to the state court on state habeas.

Even if we were to agree with Strickler that cause exists to excuse his procedural default, Strickler cannot establish prejudice. To establish "actual prejudice," Strickler "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982); *Satcher v. Pruett*, 126 F.3d 561, 572 (4th Cir.), *cert. denied*, 118 S. Ct. 595 (1997).

Under *Brady* and its progeny, the prosecution's failure to disclose "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *United States v. Ellis*, 121 F.3d 908, 914 (4th Cir.) (quoting *Brady*, 373 U.S. at 87), *cert. denied*, 118 S. Ct. 738 (1998); *accord Kyles v. Whitley*, 514 U.S. 419, 431 (1995). However, evidence is material "only where there exists a 'reasonable probability' that had the evidence been disclosed the result of the trial would have been different." *Ellis*, 121 F.3d at 914 (quoting *Wood v. Bartholomew*, 516 U.S. 1, 5 (1995)). A "reasonable probability" of a different result is shown when the government's failure to disclose evidence "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434.

In our view, the Stolzfus materials would have provided little or no help to Strickler in either the guilt or sentencing phases of the trial. During either phase, Strickler never contested that he abducted and robbed Whitlock. In fact, counsel for Strickler argued to the jury during the guilt phase that they should convict Strickler of first degree murder rather than capital murder because Henderson, rather than Strickler, actually killed Whitlock. Thus, Stolzfus' testimony was not critical to the Commonwealth's case, especially in view of the overwhelming evidence in the record, independent of Stolzfus' testimony, demonstrating that Strickler abducted and robbed Whitlock. During the sentencing phase, Stolzfus' testimony was of no import. For the future dangerousness aggravating circumstance, the parties focused their arguments on Strickler's prior criminal record, which included approximately eleven prior convictions. As to the vileness predicate, although the prosecutor did state the uncontested fact that Whitlock was abducted, the focal point of his argument was on the use of the sixty-nine pound boulder to crush and fracture Whitlock's skull. In

short, the failure to disclose any or all of the Stolzfus materials does not undermine our "confidence in the outcome of the trial." *Id.*

In summary, Strickler's *Brady* claim is procedurally defaulted and he has failed to establish cause and prejudice to excuse the default. Accordingly, the district court erred when it granted the writ on Strickler's *Brady* claim.[11]

III

In his cross-appeal, Strickler contends that the Virginia Supreme Court's proportionality review of his death sentence was constitutionally inadequate. In response, the Commonwealth contends that this claim is procedurally defaulted and that Strickler has not established cause to excuse the procedural default. Alternatively, the Commonwealth argues that the claim is without merit.

Strickler presented this claim for the first time in his state habeas petition and it was found to be procedurally defaulted under the authority of *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974). In *Slayton*, the Virginia Supreme Court held that claims that could have been raised at trial or on direct appeal but were not cannot be considered on collateral review. *Id.* at 682. The district court held that Strickler's proportionality review claim was procedurally defaulted under *Slayton* and that Strickler failed to establish cause and actual prejudice to excuse the default.

Absent cause and actual prejudice or a miscarriage of justice,[12] a federal habeas court may not review constitutional claims when a state court has declined to consider their merits on the basis of an adequate and independent state procedural rule. *See Harris v. Reed*, 489

[11]Even if we could get beyond the threshold question of procedural default, for the same reasons why Strickler cannot demonstrate prejudice to excuse the procedural default of his *Brady* claim, Strickler's *Brady* claim fails on the merits.

[12]Because Strickler has not attempted to establish that our refusal to address his procedurally defaulted proportionality review claim would result in a miscarriage of justice, we do not address the miscarriage of justice exception.

U.S. 255, 262 (1989). Such a rule is adequate if it is regularly or consistently applied by the state court, *see Johnson v. Mississippi*, 486 U.S. 578, 587 (1988), and is independent if it does not "depend[ ] on a federal constitutional ruling," *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

Under federal habeas law, we are not at liberty to question a state court's application of a state procedural rule because a state court's finding of procedural default is not reviewable if the finding is based upon an adequate and independent state ground. *See Harris*, 489 U.S. at 262; *Barnes v. Thompson*, 58 F.3d 971, 974 n.2 (4th Cir. 1995). Because *Slayton* is an independent and adequate state ground, we can consider only whether cause and prejudice exists to excuse the procedural default, not whether the state court correctly applied its own law. *See Harris*, 489 U.S. at 262.

Strickler contends that he has established cause because he was unable to raise his proportionality review claim until after the Virginia Supreme Court conducted such a review and subsequently affirmed his sentence on direct review. We disagree.

As noted earlier, objective factors that constitute cause include "'interference by officials' that makes compliance with the State's procedural rule impracticable, and 'a showing that the factual or legal basis for a claim was not reasonably available to counsel.'" *McClesky*, 499 U.S. at 493-94 (quoting *Murray*, 477 U.S. at 488). Findings of the state court supporting its decision to apply the state procedural default rule are entitled to a presumption of correctness in determining whether cause exists to excuse a procedural default. *See* 28 U.S.C. § 2254(d); *Sumner v. Mata*, 449 U.S. 539, 547 (1981); *Stockton*, 41 F.3d at 924.

An issue before the Virginia Supreme Court on direct appeal was whether Strickler's death sentence was "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *See* Va. Code Ann. § 17-110.1(C)(2). Obviously, Strickler was free to assert, and the Virginia Supreme Court was free to entertain, a facial challenge to all proportionality review in the Commonwealth of Virginia on direct appeal, prior to the Virginia Supreme Court's proportionality review. Furthermore, Strickler was

free to assert, and the Virginia Supreme Court was free to entertain, an as-applied challenge to the proportionality review that he received on direct appeal in a rehearing petition to the Virginia Supreme Court. In fact, Strickler filed a petition for rehearing, but did not challenge the Virginia Supreme Court's proportionality review of his death sentence. Accordingly, Strickler has not met his burden of "'showing that the factual or legal basis for [the proportionality review] claim was not reasonably available to counsel,'" *McClesky*, 499 U.S. at 494 (quoting *Murray*, 477 U.S. at 488), and, therefore, has failed to establish cause to excuse the procedural default.[19]

IV

For the reasons stated herein, the judgment of the district court is affirmed in part, vacated in part, and remanded with instructions to dismiss the petition.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS

LUTTIG, Circuit Judge:

Appellee/cross-appellant Tommy Strickler has filed a motion that I be disqualified from participation in the decision of this case pursuant to 28 U.S.C. § 455. (On different grounds, counsel for Strickler

[19]Even if we were able to get past the threshold question of procedural default, Strickler would not be entitled to relief. First, it is well-settled that no proportionality review is constitutionally mandated. *See Pulley v. Harris*, 465 U.S. 37, 50-51 (1984). As we stated in *Petersen v. Murray*, 904 F.2d 882 (4th Cir. 1990), "this court may not issue a writ of habeas corpus on the ground that the [Virginia] Supreme Court has made an error of state law." *Id.* at 887 (citation and internal quotes omitted). *See also Buchanan v. Angelone*, 103 F.3d 344, 351 (4th Cir. 1996) (stating that claim that proportionality review was inadequate cannot form the basis of federal habeas corpus relief), *aff'd*, 118 S. Ct. 757 (1998). Second, we have examined the proportionality review conducted by the Virginia Supreme Court, *see Strickler v. Commonwealth*, 404 S.E.2d at 237, and we cannot conclude that Strickler has been denied any federal constitutional right, if one were to exist, to adequate and meaningful proportionality review.

earlier sought, and was denied, recusal of the state habeas judge.). As grounds for disqualification, Strickler's counsel, Barbara L. Hartung and Mark E. Olive, cite the "unavoidable parallels" between the murder of my dad and the murder of Leanne Whitlock for which Strickler stands convicted. The Commonwealth opposes the motion for the reasons stated in its response.

The circumstances surrounding my dad's murder are so different from those surrounding the murder of Leanne Whitlock that, in my judgment, no one, except those who believe I should not sit in any murder case because my dad was the victim of a murder, could, on this ground, reasonably question my ability to sit impartially on the panel deciding this case. Moreover, the legal issues presented in this appeal have no counterpart whatever in any of the proceedings involving those who murdered my dad. Accordingly, the motion is denied.

My dad was murdered in the driveway of his home in Tyler, Texas, during a carjacking, at approximately 11:00 p.m. on April 19, 1994 — more than four years ago now. Upon exiting his vehicle in the garage, my dad was confronted by three armed, black youths, and shot twice in the head with a .45 caliber weapon. A single shot was fired at my mother, but she was not struck. The three perpetrators left my parents' home immediately. No personal items, other than the car, were stolen from my dad or my mother. Nothing was stolen from the interior compartments of my parents' car. At trial, it was shown that the three youths who murdered my dad had contemplated, and actually attempted, other carjackings in the immediately preceding days and that they had, on the night of the murder, followed my mother and dad to their home, having the purpose and intent of stealing my parents' vehicle. Although the three who murdered my dad were black, there was no testimony presented of either racial motivation or racial animus. Two of the three youths were convicted in federal court on carjacking charges and in state court on murder charges. The third was convicted of capital murder in state court.

There are few parallels between the circumstances of my dad's murder and the circumstances of Leanne Whitlock's murder, and those that do exist are the most general in nature — for example, that three perpetrators were involved and that they stole a vehicle. Leanne

Whitlock was a black female, and a sophomore at James Madison University when she was murdered. Whitlock was forcibly abducted from a shopping mall parking lot in the early evening hours by Strickler, a white adult male, and two white adult companions.

The three forced Whitlock to drive to a distant cornfield, where she was apparently raped, and then killed with a 69-pound boulder. *Id.* at 231. According to the Virginia Supreme Court, whose findings in this particular regard are not before us for review:

> Leanne's hands were extended over her head and crossed at the wrists. She had been dragged by the feet over the ground face down at or shortly after the time of her death, leaving long linear scratches on her upper body. There were lacerations and abrasions on the face, neck, and thighs, some consistent with kicking.

Id. The Virginia Supreme Court affirmed that Whitlock's "[d]eath was caused by four large, crushing, depressed skull fractures with lacerations to the brain. Brain tissue had exuded from the left front of the skull, and bone fragments were embedded in the brain." *Id.* Whitlock's nude, frozen, buried body was subsequently found in the field by authorities. Again according to the Virginia Supreme Court, the shirt worn by Strickler the night of the murder "bore stains from semen consistent with Strickler's, as well as human bloodstains. Vaginal swabs taken from Leanne's body also showed the presence of semen, but its type was not identified." *Id.* at 231-32. Said the court:

> Prior to [Whitlock's] murder, the victim had been abducted by strangers, was terrified and called for help, was driven to a deserted field, was dragged, struggling, out of her car, was stripped naked, beaten, kicked, and sexually assaulted.

Id. at 237.

After the murder, Strickler and his codefendant discussed, in the presence of a third person, a fight they had had with a "nigger," *id.* at 231; Strickler said they had kicked the "nigger" in the back of the head, had used a "rock crusher," and that the "nigger" would give

them no more trouble. *Id.* Strickler, his codefendant, and the third person then drove back to the town where the murder occurred "to purchase drugs." *Id.*

Strickler was indicted for robbery of not only Whitlock's vehicle, but also other of her personal property, including her wristwatch, earrings, and bank card. *Id.* at 230-31. Although Strickler was indicted and apparently convicted for robbery of Whitlock's vehicle, it is unclear whether Whitlock's vehicle was stolen principally for the value of the car itself or instead as a get-away vehicle; the suggestion is that the latter was the purpose. *See Strickler* v. *Commonwealth*, 404 S.E.2d 227, 230 (Va. 1991) ("Suddenly, Strickler ran out of the mall and addressed the occupant of a nearby van, angrily pounded on the van's door. Strickler also ran up to the occupants of a pick-up truck. He then turned to the Mercury Leanne was driving, which was stopped in traffic, and pounded on the passenger side window.").

Apart from the dissimilarity of the circumstances between my dad's murder and Whitlock's murder, to my knowledge the issues presented by this appeal under *Brady* v. *Maryland*, 373 U.S. 83 (1963), bear no resemblance in any respect to any of the issues raised by any of those convicted of my dad's murder in any of their proceedings to date. Indeed, insofar as I am aware, there has never been raised an issue of changing eye-witness testimony or the improper withholding of exculpatory evidence in any of the appeals from the convictions for my dad's murder.

Against the backdrop of the factual and legal dissimilarities between my dad's murder and the appeals from the ensuing convictions on the one hand, and Leanne Whitlock's murder and the instant appeal on the other, the natural inference arises that the present disqualification motion has been filed not because my dad was the victim of a murder, but, rather, because I am the author of three, and I joined a fourth, of this Circuit's authorities which Strickler's counsel could have reasonably surmised might bear upon the disposition of the appeals *sub judice*. *See Barnes* v. *Thompson*, 58 F.3d 971 (4th Cir. 1995) (Luttig, J.), *cert. denied*, 116 S. Ct. 4351 (1995); *Hoke* v. *Netherland*, 92 F.3d 1350 (4th Cir.) (Luttig, J.), *cert. denied*, 117 S. Ct. 630 (1996); *In re Netherland*, No. 97-8 (4th Cir. Apr. 10, 1997) (Luttig, J., single Circuit Judge) (staying district court's *ex parte* grant

of pre-petition discovery to state prisoner); *In re Pruett*, 133 F.3d 275 (4th Cir. 1997) (Hall, J., joined by Luttig and Motz, JJ.).

Because of the time that has elapsed since my dad's murder; the dissimilarity of the circumstances surrounding my dad's and Leanne Whitlock's murders; and the lack of any overlap in the legal issues presented in the appeals of the two cases, I do not believe that it can reasonably be maintained either that I cannot impartially sit in judgment of this appeal or that my impartiality can fairly be questioned. Nor, any more than recusal from discrimination cases should be required by judges who themselves, or whose families, have been subjected to invidious racial or sexual discrimination, do I believe that my recusal is required from this and all other murder cases for the reason alone that my dad was the victim of a murder.

The purpose of section 455 is not to require recusal from the courts of all who have experienced the fullness of life — good and bad; and certainly its purpose is not to enable forum shopping by parties to litigation. Rather, its purpose is only to ensure that the matters before the courts are decided by a judiciary that is impartial both in fact and in appearance. I do not believe that this indisputably important purpose is, in any way, compromised or disserved by my participation in this case. As I have earlier stated in open court, capital defendants are entitled to fair and impartial consideration of their claims by me when I am randomly selected to serve on the panel hearing their cases. Neither before nor after my dad's murder have they received less.

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TOMMY DAVID STRICKLER,

Petitioner,

v.

J.D. NETHERLAND, Warden,

Respondent.

Civil Action
No. 3:95cv924

ORDER

The Court is in receipt of the respondent's motion to dismiss petitioner's habeas corpus petition. For the reasons stated in the Memorandum this day filed and deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED, that the Court grants respondent's motion to dismiss with respect to claims B(10),C,E,G,H,I,K,L,M,O,P,Q,R,T, and V.

The Court grants an evidentiary hearing on the remainder of petitioner's claims.

Let the Clerk send copies of this Order to counsel of record.

UNITED STATES DISTRICT JUDGE

DEC 10 1996

DATE

54

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TOMMY DAVID STRICKLER,)
)
Petitioner,)
)
v.) Civil Action
) No. 3:95CV924
J.D. NETHERLAND,WARDEN)
)
)
Respondent.)
)

MEMORANDUM

On September 19, 1990 the Circuit Court of Augusta County found Tommy David Strickler guilty of the capital murder of Leanne Whitlock. Pursuant to 28 U.S.C. § 2254 Strickler filed a Petition for a Writ of Habeas Corpus and an Amended Petition for a Writ of Habeas Corpus against Respondent J.D. Netherland, Warden of Mecklenberg Prison. This matter comes before the Court on Respondent's motion to dismiss Strickler's petition for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The motion has been fully briefed by the parties and is ripe for decision.

BACKGROUND

1. Procedural History:

On February 27, 1990 the Circuit Court of Augusta County,

53

Virginia charged Strickler on one count of abduction and one count of robbery. On April 23, 1990 the court indicted him for capital murder. Strickler pleaded not guilty to all charges. Strickler was tried by a jury before the Circuit Court of Augusta County (J.Wood) and found guilty of capital murder, robbery ,and abduction. The jury sentenced him to two life sentences and to death on June 21, 1990, and the judge upheld the sentence in the sentencing hearing on September 19, 1990.

On April 19, 1991 the Virginia Supreme Court upheld Strickler's conviction and sentence in Strickler v. Commonwealth, 404 S.E.2d 227 (1991). The United States Supreme Court denied his petition for a writ of certiorari. Subsequently, Strickler filed a petition for a writ of habeas corpus in the Circuit Court of Augusta County. The court dismissed the petition in full without an evidentiary hearing on September 10, 1993. The Virginia Supreme Court granted certiorari with respect to limited issues, but denied the petition on January 13, 1995. Strickler v. Netherland, 452 S.E.2d 648 (1995). Strickler's petition for a writ of certiorari to the United States Supreme Court was denied on October 2, 1995. On March 5, 1996 Strickler filed his federal habeas corpus petition in this Court.

Factual Background

In affirming Strickler's conviction and sentence on direct

appeal, the Virginia Supreme Court stated the facts of the case as follows:

On January 5, 1990, Leanne Whitlock (Leanne), a sophomore at James Madison University, borrowed a 1986 Mercury Lynx from her boyfriend, who worked at the Valley Mall in Harrisonburg. The car was clean at the time. Leanne left the mall at 4:30 p.m. and, with her roommate, Sonja Lamb, drove to a store, where Leanne had a part-time job, to pick up a paycheck. Leanne *486 dropped Sonja off about 6:45 p.m. and left, alone, to return the borrowed car to her boyfriend.

Anne Stolzfus was in a store at Valley Mall with her daughter at 6:00 p.m. when Strickler, Ronald Henderson, and a blond woman entered. Strickler was behaving in such a loud, rude, and boisterous manner that she watched him with some apprehension. He was dressed in casual, but clean, clothing.

As Mrs. Stolzfus was leaving the mall soon thereafter, she saw Leanne Whitlock driving the blue Mercury. Suddenly, Strickler ran out of the mall and addressed the occupant of a nearby van, angrily pounding on the van's door. Strickler also ran up to the occupants of a pick-up truck. He then turned to the Mercury Leanne was driving, which was stopped in traffic, and pounded on the passenger side window. Leanne leaned over as if to lock the door, but Strickler wrenched the door open and jumped into the car, facing Leanne. She appeared to try to push him away, but he opened the door and beckoned Henderson and the blond woman to join him.

Leanne accelerated and began sounding blasts on the horn. Strickler struck her repeatedly and she ceased to sound the horn and stopped the car. Henderson and the blond woman entered the back seat. Mrs. Stolzfus came up to the car and asked, three times, "are you O.K.?" Leanne seemed "totally frozen." She drove the Mercury away very slowly, and mouthed the word, "help." The Mercury headed east on Route 33, toward Elkton. Mrs. Stolzfus' daughter wrote down its license number, West Virginia NKA 243.

About 7:30 p.m., Kurt D. Massie and a friend were driving north on Route 340 near Stuarts Draft. They saw a dirty blue car, southbound, turn off and drive into a field. Strickler was the driver, a white woman was in the front seat with him,[1] and another man was in the back seat. Massie thought he saw a fourth occupant in the car.

Between 9:00 and 9:15 p.m., Strickler and Henderson walked into Dice's Inn in Staunton. Strickler was wearing blue jeans

[1]Leanne was black

which were dirty, bloody, and had a burn mark on them. He gave a wristwatch, later identified as the property of Leanne Whitlock, to a girl named Nancy Simmons.

At 12:30 or 1:00 a.m., Strickler left Dice's Inn with Henderson and a girl named Donna Tudor. The three entered a dirty blue Mercury. Henderson drove the car and Strickler sat in the back seat with Donna. Strickler told her he had bought the car from a man for $500. He also said that he had been in a fight and had injured his knuckle, which appeared to be lacerated. Strickler and Henderson discussed a "fight" they had with "it," describing "it" with a racial epithet. Strickler said they had kicked "it" in the back of the head and had used a "rock crusher." He said "it" would give them no more trouble. Strickler was calm during this conversation, but Henderson seemed nervous and kept looking over his shoulder at them. The three drove to Harrisonburg to purchase drugs. During the ride, Henderson nearly collided head-on with an approaching car, and Strickler drew a knife and threatened to stab him.

After dropping Henderson off in Harrisonburg, Donna Tudor went to Virginia Beach with Strickler in the blue Mercury. The two stayed nearly a week, during which time Donna saw Leanne Whitlock's driver's license, identification card, and bank card in the car. Strickler tried to use the bank card in Virginia Beach, and gave Donna a pair of earrings which Leanne had worn on the night of January 5.

Several days later, Donna and Strickler returned to Strickler's mother's home in New Market. Strickler's mother washed his bloodstained blue jeans and his shirt. Strickler told Donna to hide Leanne's three identification cards in a bag with his T-shirt and other clothing. She deposited these items in an abandoned car behind Strickler's stepfather's house, but later led police to them.

On January 10 or 11, Donna and Strickler abandoned the blue Mercury near a church. Angry after an argument with Donna, Strickler cut up the interior of the car with his hunting knife and also jumped on the car's roof, leaving his footprints.

On January 13, Henderson's frozen wallet was found in the cornfield into which Kurt Massie had seen Strickler drive the blue Mercury on January 5. Later that day, police searched the field and found Leanne's frozen clothing in a pile near the place Henderson's wallet had been found. Leanne's nude, frozen body was found in a nearby wooded area, 300 feet from the highway, buried under two logs and covered with leaves which had been deliberately packed around the logs. Leanne's hands were extended over her head and crossed at the wrists. She had been dragged by the feet over the ground face down at or shortly after the time of her death, leaving long linear scratches on her upper body. There were lacerations and abrasions on the face, neck, and

thighs, some consistent with kicking. Death was caused by four large, crushing, depressed skull fractures with lacerations of the brain. Brain tissue had exuded from the left front of the skull, and bone fragments were imbedded in the brain. Any one of the fractures could have been fatal, but death was not instantaneous.

Near the body, the police found a large rock, weighing 69 pounds, 4 ounces, which was stained with human blood in two places. Despite the very cold weather, the rock was not frozen to the ground. Beside the rock, there were two indentations in the frozen ground, one four inches deep, the other less. Each indentation contained blood of Leanne's blood type, as well as human hair consistent with Leanne's in all respects. Human hairs were also found on Leanne's frozen clothing. They were Caucasian in origin and matched Strickler's hair in all respects. Some of them had evidently been torn out of his head by the roots. Two of the shoe impressions on the roof of the Mercury matched a shoe Strickler was wearing when he was arrested on January 11. Eighteen of his fingerprints, and nine of Donna Tudor's, were identified in the car. A jacket with Henderson's identification was found in the car. It bore at least four human bloodstains. The shirt Strickler had been wearing on January 5 was recovered from the brown bag Donna had hidden. It bore stains from semen consistent with Strickler's, as well as human bloodstains. Vaginal swabs taken from Leanne's body also showed the presence of semen, but its type was not identified.

DISCUSSION

The Applicability of the 1996 Antiterrorism and Effective Death Penalty Act

On April 24, 1996 while Strickler's petition was pending, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L.No. 104-132, 110 Stat.1214 ("the Act") became effective. Title I of the Act, entitled "Habeas Corpus Reform," substantially alters the substantive law governing habeas corpus petitions. Sections 101-106 of the Act modify pre-existing habeas corpus procedures contained in Chapter 153 of the Judicial Code, 28

U.S.C. §§ 2241-2255. Section 107(a) of the Act enacts a new Chapter 154, 28 U.S.C. §§ 2261-2266, which applies to petitions in capital cases.

Respondent asserts that the Act, which amends and adds to pre-existing law governing habeas corpus review, should be applied retroactively in resolving the issues presented by Strickler's petition. Strickler argues that the law in effect at the time he filed the petition should govern. Before addressing the substance of Strickler's claims, it is, therefore necessary to determine whether, and to what extent, the Act applies to Strickler's petition.

Chapter 154, New Habeas Corpus Provisions:

Section 107(a) of the Act, codified at Chapter 154, 28 U.S.C. §§ 2261-2266, essentially offers a system of expedited review and other "benefits" to states that qualify under either of two "opt in" procedures: 1)the "post-conviction" procedure provided by Section 2261; or 2) the "unitary review" procedure provided by Section 2265. The substantive changes this chapter makes to the law currently governing federal habeas review are summarized by the district court in Hill v. Butterworth:

> If a state opts in to the new habeas provisions, it receives several procedural benefits. First, petitions for habeas relief under Section 2254 must be filed in federal court within 180 days 'after final state court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.' 28 U.S.C. § 2264(a). Second, federal district courts are limited to only considering 'a claim or

> claims that have been raised and decided on the merits in the State courts.' 28 U.S.C. § 2264. Third, adjudication of a petition subject to Chapter 154 must be given priority by the district court and court of appeals 'over all noncapital matters.' 28 U.S.C. § 2266 (a). Fourth, reviewing courts are forced to expedite their review of habeas petitions brought under the Chapter 154. District courts must render a final judgment on a habeas petition within 180 days after the petition is filed, allowing the parties at least 120 of those days to brief the case and have a hearing on the merits. A court of appeals must hear and render a final determination of an appeal within 120 days after the reply brief is filed. 28 U.S.C. § 2266. Fifth, no amendment to a habeas petition subject to Chapter 154 is permitted after the filing of the answer to the petition, except on certain grounds set forth in § 2244(b). 28 U.S.C.§ 2266(b)(3)(B).

Hill v. Butterworth 1996 WL at *3 (N.D. Fla. Aug. 7, 1996).

The Fourth Circuit in Bennett v. Angelone, 92 F.3d 1336, 1342 (4th Cir. 1996) requires this Court to analyze Strickler's petition under § 107 of the Act because that section specifically states that the Act "shall apply to cases pending on or after the date of enactment of this Act." See § 107(c). But, the Court of Appeals explained that the new provisions only affect habeas petitions if "the state has established procedures to ensure the appointment of qualified counsel to represent indigent petitioners in state post-conviction proceedings." Id. at 1342. Since, Virginia does not have a unitary review procedure, the Court must analyze whether Virginia meets the post-conviction review procedures and thus qualifies as an opt in state.

To qualify as an opt in state a state specifically must meet

all four of the following criteria:

1. The State must establish by statute, rule of its court of last resort, or other agency authorized by state law, a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent capital defendants. See § 2261(b)-

2. Such mechanism must provide standards of competency for the appointment of such counsel. See § 2261(b)

3. Such mechanism must affirmatively offer counsel to all state prisoners under capital sentence. See § 2261(c)

4. Such mechanism must provide for an entry of a court order either appointing counsel to each capital defendant, or explaining that such an appointment was not made on the basis that a defendant was not indigent or rejected the offer of counsel with an understanding of the legal consequences. See § 2261(c)

Has Virginia Satisfied the Opt-in Requirements

Since July 1, 1995 the appointment of counsel for post-conviction capital cases is required under the Va. Code § 19.2-163.7. Between July 1, 1992 and June 30, 1995, however, the appointment of counsel in the post-conviction process was made upon request by the petitioner. Va. Code § 19.2-163.7 (prior to 1995 amendment). The Fourth Circuit has not decided whether Virginia's post-conviction appointment provisions qualify it as an opt-in state. The Court of Appeals did not reach the issue in Bennett v. Angelone because Virginia's system of post-conviction appointment provisions was set up "after petitioner's Virginia habeas petition had been finally denied by the Virginia Supreme Court." Id. at 1342. Here, however, Strickler's state habeas

petition was filed and denied by the Supreme Court of Virginia after Virginia's 1992 post-conviction system was in place. Thus, the Court must examine whether the procedures in effect when Strickler filed his petition, September 1992, satisfy the opt-in requirements. [2]

Judge Payne of the Eastern District of Virginia considered the issue in Satcher v. Netherland, No. 3:95cv261 (E.D. Va. October 8, 1996). Judge Payne concluded that Virginia was not an opt-in state because it post-conviction counsel mechanisms in place between 1992 and 1995 failed to meet three of the four requirements laid out by § 107. The Court agrees with the Satcher holding that while Virginia substantially complied with the Act's requirement for the time period in question it failed to adhere to the strict formal requirements of the Act.

Only since July 1, 1995 has Virginia required by statute the appointment of competent counsel to represent indigent petitioners in its post-conviction proceedings. Before that

[2] There is some dispute as to which date courts should consider when analyzing the opt-in provisions. The Fourth Circuit in dicta suggests that courts should look at the system in place when the Virginia Supreme Court denied the petition. 92 F.3d at 1342. The district court in Wright v. Angelone, however, looked at the provisions in place when petitioner's state counsel was appointed. No. 2:96cv830 (E.D. Va. Oct 15, 1996). Since the provisions lay out the appointment of counsel the district court's approach seems the most logical. Under either method, however, the result is the same. Since Respondent picks the time of filing the state petition, the Court will look at the provisions in place at that time.

time, counsel was appointed at *petitioner's request*. Section 107, however, requires a statutory appointment mechanism that places an affirmative and automatic duty upon the State to offer competent post-conviction counsel to all prisoners sentenced to death. The Commonwealth's system in effect when Strickler filed his petition did not place such an affirmative duty upon the state. Thus while no indigent capital defendants have gone unrepresented in Virginia state habeas proceedings, the Court finds that the statute fails to meet the formal requirement of the Act. See Wright v. Angelone, action no 2:96cv830.

Furthermore, the Va. code does not provide for the compensation and reimbursement litigation expenses for such counsel. While Virginia substantially complies with the law by the General Assembly's appropriations acts that provide for the payment of such counsel it has not specifically established a "mechanism" for payment as required by the Act. The Fourth Circuit recently noted that "the Virginia statutes and regulations do not specifically provide for the compensation or payment of litigation expenses of appointed counsel, as § 107 requires." Bennett, 92 F.3d at 1342 n.2. This same conclusion was reached by the court in Satcher.

As the court in Satcher noted,"if Congress had intended to afford the States the very significant benefits conferred by Chapter 154 on the basis of a finding of substantial compliance

based on past performance, it could have done so." Id. Congress instead chose to confer the benefits only if states made a formal commitment to provide a post-conviction review system that protected capital litigants' constitutional rights. Id. This Court agrees with this analysis and finds that Virginia's system for compensation and payment of expenses fails to meet the standards established by § 107.

Virginia does not qualify as an opt-in state because it fails to adhere to the formal requirements of § 2261. While it substantially complies with the Act's provisions, its statutory scheme does not establish the rigid standards for providing counsel to indigent defendants or compensating the counsel. Therefore, it can not enjoy the "benefits" provided by the § 2261 of the Act.

Chapter 153 Amendments

Respondent argues that the general habeas provisions contained in Chapter 153 of the Act, §§ 101-106 apply to Strickler's petition. These procedures effect a number of procedural changes to previous habeas corpus statutes codified in Chapter 153. Unlike Chapter 154, they are not made explicitly applicable to petitions pending when the Act took effect. Nonetheless, the Commonwealth urges the retroactive application of the Chapter 153 amendments to Strickler's petition. This Court, however, agrees with the Satcher analysis and finds that

the Chapter 153 amendments do not apply retroactively.

The Supreme Court most recently addressed the question of retroactivity in Landgraf v. USI Film Prods., __ U.S. __, 114 S.Ct. 1483 (1994). In Landgraf, the petitioner sought the application of a new statute (Title VII of the Civil Rights Act of 1991) to cases pending on the date the new law was enacted. The Supreme Court rejected that interpretation and reaffirmed the presumption against retrospective application of statutes. Id.at 1503. The Court explained that retroactive application of legislation is disfavored because

> The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.

Id.at 1497.

In Landgraf the Court determined that when faced with the retroactivity question, a court must first determine whether Congress "has expressly prescribed the statute's proper reach." Id.at 1505. In the absence of clear congressional intent, a court must determine whether a statute would have retroactive effect, "i.e. whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Id.at 1505. If the court finds such a retroactive effect, the traditional presumption "teaches that it does not

govern absent clear congressional intent favoring such a result."Id.

After examining the language of the Chapter 153 amendments the Court finds that the Supreme Court's analysis in Landgraf prohibits retroactive application of the Act. The language of the Chapter 153 amendments contains no express provision of retroactivity. Congress, however, clearly considered the issue when drafting the Act. Section 107(c) of the Act states that "Chapter 154...shall apply to cases pending on or after the date of enactment of this Act." The Act, however, contains no similar provision for the Chapter 153 amendments. See Bennett v. Angelone, 92 F.3d at 1342-43. Congress' failure to include similar language for the Chapter 153 amendments reflects its intent that these provisions are not to apply retroactively. See Russello v. United States, 464 U.S. 16, 23 (1983)("[W]here Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")(quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)).

Both the Second and the Tenth Circuits have held that the Chapter 153 Amendments are not applicable to pending petitions. See Boria v. Keane, 90 F.3d 36, 38 (2nd Cir. 1996)("While Congress has spoken clearly in some portions of the new statute

with respect to the application of the statue to pending cases, see, e.g., § 107(c), in the context of non-capital habeas cases the statute's silence is striking. This silence coupled with the presumption against retroactivity, leads us to hold that the new statute does not apply to this case."); Edens v. Hannigan, 87 F.3d 1109 (10th Cir. 1996).

The Court finds that provisions of Chapter 153 would definitely have a retroactive effect if applied to petitioner's case. Since Congress did not expressly state that they should be applied retroactively, the Court concludes that it must follow the traditional presumption against retroactive application. Thus the Court finds that neither the new Chapter 153 amendments nor the new Chapter 154 provisions apply to Strickler's petition. Therefore, the Court will analyze Strickler's claims based on the law governing federal habeas corpus review in effect at the time he filed his petition.

Strickler's Claims:

In his federal habeas petition Strickler raises the following claims:

(A) Insufficiency of the evidence to support the verdict of capital murder

(B) Ineffective assistance of counsel

(C) Strickler did not receive the mental health expert assistance guaranteed by Ake v. Oklahoma

(D) Strickler's death sentence was arbitrary and capricious, and also disproportionate to the sentence

received by his more culpable co-indictee

(E) Improper jury instructions violated Strickler's Sixth, Eighth, and Fourteenth Amendment rights.

(F) The trial court's failure to allow counsel to ask or inform jurors about parole

(G) The trial court erroneously limited voir dire about jurors' ability to show mercy and thus follow their oaths as jurors in considering a life sentence

(H) The trial judge's refusal to qualify jurors Almarode and Wills

(I) The trial judge's failure to excuse for cause jurors Ramsey and Brooks

(J) Strickler's rights under the Sixth, Eight and Fourteenth Amendments were violated when the commonwealth withheld exculpatory evidence

(K) The prosecutor knowingly presented false testimony at Strickler's capital murder trial

(L) Strickler was deprived of his rights to a fair trial and due process of law under the Sixth, Eight, and Fourteenth Amendments when the Commonwealth presented inconsistent testimony and argument on the evidence at the two trials

(M) Strickler is actually innocent of the crime and the sentence

(N) The Supreme Court of Virginia provides inadequate and meaningless appellate review of the appropriateness of the death penalty

(O) Strickler's rights under the Sixth, Eight, and Fourteenth Amendments were deprived by prosecutor's improper comments in opening and closing arguments

(P) The Commonwealth improperly relied upon an unconstitutionally obtained conviction to show future dangerousness at the sentencing phase in violation of Strickler's rights as guaranteed by the Sixth, Eight, and Fourteenth Amendments to the Constitution

(Q) The death penalty is cruel and unusual and therefore is unconstitutional

(R) Vileness and future dangerousness under the Virginia death penalty statue are unconstitutionally vague

(S) The evidence was insufficient to establish either future dangerousness or vileness

(T) Juror misconduct

(U) The cumulative effect of the errors at trial violated Strickler's right to a fair trial as guaranteed under the Sixth, Eighth, and Fourteenth Amendments of the Constitution

(V) Ineffective assistance of appellate counsel

The Commonwealth contends that most of Strickler's claims are procedurally barred and those that are not lack merit. As a preliminary matter the Commonwealth does not dispute that Strickler has exhausted his state remedies and his claims are thus properly before this Court.

A. Insufficiency of the evidence to support the verdict of capital murder

Strickler first claims that there was insufficient evidence to convict him of capital murder. Respondent concedes that there are no procedural difficulties with this claim. Under Virginia's triggerman statute, only the immediate perpetrator of a crime may be convicted of capital murder. A conviction based on circumstantial evidence regarding who did the actual killing must "exclude every reasonable hypothesis of innocence." Rogers v. Commonwealth, 410 S.E.2d 610,627 (1991).

The Virginia Supreme Court found that there was sufficient evidence to convict Strickler of capital murder. Under § 2254(d) the state court's findings are presumed to be correct unless they fall under one of the listed eight factors. In this case the Virginia Supreme Court relied on misstatements of the record and thus lose their presumption of correctness under § 2254(d)(8). The state court improperly stated Donna Tudor's testimony about the condition of Strickler's clothing and ignored testimony of other individuals at Dice's Inn who did not describe Strickler as wearing such stained clothing that night. The Supreme Court also misstated the forensic evidence. It ignored critical testimony about additional hairs near the victim which were not Strickler's; and the expert's inability to match the semen found in the victim's body with any individual.

The jury undoubtedly had sufficient evidence to conclude that Strickler was present at the crime. The question here, however, concerns the sufficiency of the evidence to support its determination that Strickler actually committed the killing and was not an observer or accomplice. While the Court believes the inquiry is not easy; it finds that Strickler is entitled to an evidentiary hearing on the claim and that it should not be dismissed.

B. Ineffective assistance of counsel

Petitioner claims that his trial counsel rendered him ineffective assistance of counsel both during the guilt and to sentencing phases. Petitioner enumerates many instances of purported ineffectiveness, some of which respondent claims are procedurally defaulted.

The standard for ineffective assistance of counsel is set up in Strickland v. Washington, 466 U.S. 668 (1983/4). In Strickland, the Court set up a two pronged inquiry to assess counsel's performance. In order to prove ineffective assistance, a petitioner must show that counsel's performance fell below minimum standards while overcoming a strong presumption towards reasonableness. Not only do petitioners have to prove deficient performance, they must also show that counsel's errors prejudiced them. The Supreme Court defined prejudice as a reasonable probability that counsel's errors undermined confidence in the outcome of the trial.

Strickler raises numerous instances of ineffective assistance that he claims rise to the Strickland level. After reviewing his various allegations, the Court finds that this claim should not be dismissed and that Strickler should be granted an evidentiary hearing on the issue to resolve genuine issues of material facts. The failure of Strickler's counsel to pursue a voluntary intoxication defense is procedurally barred, but the other components of his claims pass the procedural

hurdles. While some of counsel's alleged ineffectiveness do not by themselves rise to the Strickland level, when examined all together, they present a genuine issue of material fact as to whether counsel performed ineffectively.

C. Failure to provide effective assistance under Ake v. Oklahoma

In Ake v. Oklahoma, the Supreme Court held that a defendant in a capital case must have the assistance of a competent, effective and independent mental health expert. Ake v. Oklahoma, 470 U.S. 68 (1985). Respondent correctly notes that Petitioner has procedurally defaulted on this claim because it was never raised on direct appeal. Petitioner claims that this claim is reviewable under Sawyer v. Whitley, 505 U.S. 333 (1992). Under Sawyer, a federal habeas petitioner may "pass through the gateway" and argue the merits of an otherwise defaulted constitutional claim arising out of an error at sentencing if the petitioner can demonstrate by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found him eligible for the death penalty under the applicable state law. Id. Petitioner argues that a competent and effective mental health expert could have made "a persuasive case to defeat the finding of future dangerousness." The Court finds that Petitioner does not meet the Sawyer test. Petitioner was evaluated by a social worker, Dr. Warren who his counsel chose

not to call. Furthermore, the Commonwealth presented much evidence on the question of future dangerousness, and it would be impossible for Petitioner to demonstrate by clear and convincing evidence that an independent mental health expert testimony would have prevented any reasonable juror from finding him eligible for the death penalty.

D. The death sentence was arbitrary capricious and disproportionate.

Petitioner argues that his sentence should be overturned because it is "excessive and disproportionate." Respondent contends that this claim is procedurally barred under Slayton v. Parrigan, 205 S.E.2d 680 (1974). The problem with Respondent's position, however, is that Petitioner could not argue that his sentence was disproportionate based on the evidence brought out in Henderson's trial until that trial took place. Thus, he could not argue this claim on direct appeal. The Court finds that this claim is not procedurally defaulted. The evidence at Henderson's trial including his admission that he committed the murder provides a basis for a hearing that Strickler's sentence was disproportionate to the crime.

E. Improper Jury instructions violated Strickler's Sixth, Eighth and Fourteenth Amendment rights.

Petitioner alleges that various jury instructions by the state court provide a basis for habeas relief. The Court finds that the jury instructions do not alone provide a basis for relief. The state court's burden shifting instruction on malice does not rise to the level of a constitutional violation. In Peterson v. Murray, 904 F.2d 882 (4th Cir. 1990) the Fourth Circuit found the exact same instruction permissible. The failure to instruct on mitigating circumstances and the state court's instruction on an improper predicate are procedurally barred. Strickler argues that trial counsel's failure to object constitutes cause and prejudice for the default. The Court does not find that trial counsel's failure to object to two instructions undermines confidence in the verdict sufficient to meet the cause and prejudice standard.

F. Trial court's failure to allow counsel to ask or inform jurors about parole

Strickler argues that this failure to inform jurors about his parole ineligibility violates the Eight Amendment's requirement that a capital sentencing authority must be able to consider "any relevant circumstance that could cause it to decline to impose the [death] penalty." McCleskey v. Kemp, 481 U.S. 279, 306 (1987). In Skipper v. South Carolina, 476 U.S. 1 (1986) the Supreme Court held that mitigating evidence should be

defined broadly; its definition would include evidence of parole ineligibility. The Court does not dismiss the claim.

G. Trial court erroneously limited voir dire about juror's ability to show mercy and thus follow their oaths as jurors in considering a life sentence.

The trial transcript reveals that Petitioner's counsel conducted extensive voir dire of the jurors. The trial court prohibited counsel from asking one question about mercy. The Court finds that the inability to present this one question to the jurors does not constitute a constitutional violation. Therefore, this claim is dismissed.

H. Trial judge's refusal to qualify jurors Almarode and Wills.

Juror Wills stated that he could not impose the death penalty under any circumstances; thus he was properly barred from serving on the jury. Similarly, juror Almarode said that she could not vote to convict if she knew there was a possibility that Petitioner would receive the death sentence. The Court finds that the trial judge properly refused to qualify these jurors based on their opposition to the death penalty and dismisses this claim.

I. Refusal to excuse for cause jurors Ramsey and Brooks

The Virginia Supreme Court found that these two jurors were

impartial. The Fourth Circuit in Fields v. Murray, 49 F.3d 1024 (4th Cir. 1995) found that such a determination is entitled to federal court deference. The Supreme Court of Virginia found ample evidence existed to support the trial judge's determination of impartiality and this Court defers to its ruling. This claim must be dismissed.

J. Violation of Strickler's Sixth, Eighth and Fourteenth amendment rights when Commonwealth withheld exculpatory evidence.

Petitioner contends that the Commonwealth withheld exculpatory impeachment evidence about Ann Stolzfus and Donna Tudor. The Commonwealth failed to disclose interviews and letters of Stoltzfus that contradicted and impeached her trial testimony. In her initial police interviews and subsequent letters to the police, Stolzfus could not identify Strickler as the man she saw in the car at the mall, could not identify Whitlock, and only described Whitlock's car and license plate number after viewing the seized vehicle at the police impound lot.

Respondent argues that this claim is procedurally barred. Petitioner states that the Court can hear his claim because his trial counsel's ineffectiveness for failing to file a Brady claim constitutes cause and prejudice for his default. "An attorney's effectiveness may constitute cause for excusing a procedural default when a petitioner has a constitutional right to effective

assistance of counsel and when that assistance is constitutionally ineffective under the standard established in Strickland v. Washington." Smith v. Dixon, 14 F.3d 956, 973 (4th Cir. 1994). The Court finds that the failure of Strickler's trial counsel to pursue a Brady motion constitutes cause for the default. Since Stoltzfus was the main witness to place Strickler at the mall and with Whitlock, his inability to use impeachment material prejudiced him. Accordingly, the Court grants him an evidentiary hearing on his claims.

Petitioner also claims that the Commonwealth withheld impeachment testimony about Tudor. Tudor's first comments to the police fail to mention all the incriminating details about Strickler that she testified to during trial. Petitioner alleges that Tudor had a motive to fabricate her testimony in exchange for immunity on a pending grand larceny charge. Respondent claims that this claim is also procedurally barred; Petitioner asserts the same cause and prejudice argument he made about Stolzfus. The Court does not believe that Tudor's inconsistencies truly prejudiced Strickler, thus it believes the claim is procedurally defaulted.

K. Prosecutor knowingly presented false evidence at trial.

Petitioner argues that the prosecution knew that Stoltzfus manufactured her testimony and thus by allowing her testify they

permitted false testimony to be presented in court. Petitioner does not allege that the prosecution knowingly allowed Stoltzfus to lie on the stand. Instead, he is suggesting that since her testimony changed over time, prosecutors knew that her trial testimony could not be true. While the Court believes there may be some merit to the suppression of this impeachment testimony, it does not believe it rises to prosecutorial misconduct as alleged here. This claim must be dismissed and the Court need not reach the procedural default issue.

L. Right to fair trial

This claim has no merit. The prosecution must present the best case it can. The cases Strickler cites in support of this claim describe much more egregious behavior than the behavior at issue here. For the Henderson and Strickler trials, the prosecution was just adopting different trial strategies based on the different cases it had to prove. Such actions do not constitute a constitutional violation.

M. Strickler actually innocent of the crime and sentence

Respondent states that this claim is procedurally barred. Petitioner claims that actual innocence overcomes procedural default under Schlup and Sawyer. While these two do support a "loop hole" for actual innocence, they establish a very strict

standard that is rarely met. In Schlup, the Supreme Court held that for a habeas petitioner to pass through the "gateway" and have the federal habeas court reach the merits of his defaulted claims: "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Id. at 867.

Petitioner presents new evidence which he claims shows his innocence. He submits the sworn testimony of Jeffrey Woods at Henderson's trial that Henderson admitted he, not Strickler, dropped the rock on Whitlock. He additionally states that Henderson's hair samples were like the hairs recovered from various clothing found at the scene. Henderson's PGM subtype was consistent with that found in vaginal and rectal swabs taken from the victim. Lastly, forensic evidence developed since Strickler's trial indicates that Whitlock probably died of strangulation and not from head injuries.

Petitioner's new evidence does not meet the Schlup standard. Petitioner's evidence only goes to the question of who actually committed the murder. Balanced against the new evidence that points to Henderson's guilt, is the evidence presented by the Commonwealth at Strickler's trial. An eyewitness saw Strickler abduct the victim, his shirt contained traces of human blood and semen, semen was found in the victim's body; Strickler's hair was found near the victim's body, he retained possession of the

victim's credit cards, he took her car and made statements about kicking the victim in the head and being a "rock crusher." Thus this new evidence does not make it more likely than not that a reasonable juror would conclude that Strickler was not guilty. The Court will dismiss this claim.

N) The Supreme Court of Virginia provides inadequate and meaningless appellate review of the appropriateness of the death penalty.

Respondent states that this claim is procedurally defaulted under Slayton v. Parrigan. As Petitioner correctly points out, however, he could not have pointed out errors in the appellate process until the appellate process was over. He argues that the Virginia Supreme Court failed to compare cases where the defendants received life with those cases where the defendants received death. He also argues that the court failed to compare mitigation evidence in various cases; lastly, Strickler argues that the court's review relied on incorrect statements of evidence at trial. Petitioner brought this claim up on state habeas which was his first opportunity to challenge the Virginia Supreme Court's actions. This claim is properly before the Court, and the Court will grant Petitioner an evidentiary hearing on the claim.

O) Strickler's rights under the Sixth, Eight, and Fourteenth

Amendments were deprived by the prosecutor's improper comments in opening and closing arguments.

The Court agrees with respondent that this claim is procedurally barred under Slayton.

P) The Commonwealth improperly relied upon an unconstitutionally obtained conviction to show future dangerousness at the sentencing phase in violation of Strickler's rights as guaranteed by the Sixth, Eighth, and Fourteenth Amendments.

Respondent argues that this claim is procedurally defaulted. Petitioner argues that the claim is reviewable under Sawyer v. Whitley. Sawyer requires a petitioner to prove by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found him eligible for the death penalty. The jury relied on numerous pieces of evidence to find Strickler eligible for the death penalty. They looked at his behavior before, during and after the killing of Whitlock as well as his continuing criminal activity. Assuming arguendo that the Commonwealth did improperly introduce Strickler's conviction, the jury still had sufficient other evidence to support its finding of future dangerousness. The Court dismisses this claim.

Q) The death penalty is cruel and unusual and therefore unconstitutional.

The Court dismisses this claim because it is without merit. See Gregg v. Georgia, 428 U.S. 153 (1976) (when proportional to the severity of the crime and not a wanton infliction of pain the

death penalty is constitutional)

R) Vileness and Future Dangerousness under the Virginia Death Penalty statute are unconstitutionally vague.

In this claim, the Petitioner asserts that the "future dangerousness" aggravating factor under Virginia law is unconstitutionally unreliable and vague. Respondent correctly notes that Petitioner has procedurally defaulted on this claim.

Petitioner purports to evade the procedural default by arguing that the claim is reviewable under Schlup and Sawyer. The Court concludes that this claim does not meet this standard and is dismissed.

S) Evidence was insufficient to establish either future dangerousness or vileness

This claim is similar to the insufficiency of the evidence argument raised in claim A. The Court will grant an evidentiary hearing on this claim.

T) Juror misconduct

Respondent correctly notes that this claim is procedurally barred. Petitioner contends that he met the procedural hurdle by raising the claim in his state habeas. Since he did not, however, raise it on direct appeal, the Court finds this claim barred under Slayton.

U) The cumulative effect of the errors at trial violated Strickler's right to a fair trial as guaranteed under the Sixth, Eighth, and Fourteenth Amendments of the Constitution.

This claim survives the motion to dismiss and the Court will grant an evidentiary hearing on those matters it has not ruled are procedurally barred.

V) Ineffective Assistance of Appellate Counsel

In Claim V the Petitioner asserts that he was rendered ineffective assistance of appellate counsel because he did not receive an accurate record of the proceedings. The Court finds that this claim is not procedurally defaulted, but that it lacks merit. Accordingly, the claim must be dismissed.

An appropriate order will follow

Robert G. Doumar, Sr.
UNITED STATES DISTRICT JUDGE

DEC 10 1996
DATE

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TOMMY DAVID STRICKLER,

Petitioner,

v.

J.D. NETHERLAND, WARDEN

Respondent.

Civil Action
No. 3:95CV924

ORDER

The Court is in receipt of Respondent's motion to alter or amend its judgment of December 10, 1996. For the reasons stated in the Memorandum this day filed and deeming it just and proper so to do, it is ADJUDGED and ORDERED that the Court grants respondent's motion with respect to claims A,D,F,N, and S.

The Court grants an evidentiary hearing on petitioner's claims B,J, and U.

Let the Clerk send copies of this Order to counsel of record.

UNITED STATES DISTRICT JUDGE

Jan. 16, 1997
DATE

65

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TOMMY DAVID STRICKLER,

Petitioner,

v.

J.D. NETHERLAND, WARDEN

Respondent.

Civil Action
No. 3:95CV924

MEMORANDUM

The Court is in receipt of respondent's motion to alter or amend its judgment of December 10, 1996. In its Order, this Court granted petitioner an evidentiary hearing on claims A,B,D,F,J,N,S, and U. Respondent contends that these claims either have no merit as a matter of law, fail to raise a cognizable federal issue or raise only pure legal issues for which an evidentiary hearing is unnecessary.

Claims A and S: Sufficiency of the Evidence to Prove Capital Murder, Vileness and Future Dangerousness

Upon reconsideration, the Court will dismiss these two claims as lacking merit. After further examination of the record, there is enough evidence to support the jury's determination that Strickler committed the capital murder. The Commonwealth presented testimony and evidence that Strickler was

present at the murder scene; his shirt contained traces of human blood and semen; his hair was found near the victim's body; he stole the victim's car and credit cards; he made statements about kicking the victim in the head and being a "rock crusher." The jury had enough evidence to support its finding that Strickler alone committed the murders.

The evidence on the record also supports a jury's determination that Strickler jointly participated in the killings and thus his conviction for capital murder is permissible under Virginia's "triggerman" rule. It was reasonable for the jury to conclude that the victim was bludgeoned to death and not strangled; the evidence about the rock's weight and that one man was needed to hold Whitlock down supports a finding that two men were needed to accomplish the act.

Similarly, the jury's determination of vileness and future dangerousness is also reasonable and supported by the record. Accordingly, the Court will dismiss these two claims.

Claim B. Ineffective Assistance of Counsel

The Court reaffirms its grant of an evidentiary hearing to the petitioner on this issue. Petitioner has not had a hearing on this issue in state court, and thus he has never had the opportunity to fully develop his claim. Petitioner has alleged numerous new facts in support of his ineffectiveness claim, and

pursuant to 28 U.S.C. § 2254(d) and Townsend v. Sain, 372 U.S. 293 (1963), this Court may grant him a hearing to develop his claim.

Claim D. Arbitrary, Capricious, and Disproportionate Death Sentence

The Court will dismiss this claim because it is essentially a proportionality claim. While Pulley v. Harris, 465 U.S. 37 (1984) does not ban all proportionality claims, in the case at bar, Strickler has not presented a constitutional claim.

Claim F. The Meaning of Parole and a Life Sentence

Contrary to respondent's contention, this claim[1] is not procedurally barred. Petitioner raised it on direct appeal and on state habeas. The Court, however, believes that the information Petitioner sought to present to the jury does not constitute a constitutional violation of the Supreme Court's requirement that sentencing authorities consider all mitigating evidence. See McClesky v. Kemp, 481 U.S. 279 (1987). The Court will deny an evidentiary hearing on this issue because this claim seeks an impermissible retroactive application of a new rule.

[1]The Court understands that Petitioner's claim is not that he is "parole ineligible," but rather that he should have been able to inform jurors that no one who has been convicted of capital murder but sentenced to life imprisonment has ever been released on parole. Petitioner also argues that he was not able to ask jurors what a life sentence actually meant to them.

Petitioner's claims is analogous to Simmons v. South Carolina, 114 S.Ct. 2187 (1994)(Capital defendant allowed to rebut evidence of future dangerousness with proof of parole ineligibility.). The Fourth Circuit in O'Dell v. Netherland, 95 F.3d 1214 (4th Cir. 1996) held that the Simmons holding was a new rule that could not be applied retroactively.[2] Accordingly, the Court will dismiss this claim.

Claim J. The Commonwealth Withheld Exculpatory Evidence

The Court affirms its grant of an evidentiary hearing on the prosecution's failure to disclose exculpatory and impeachment evidence concerning witness, Ann Stoltzfus. Petitioner has demonstrated cause for his failure to raise this claim earlier. Defense counsel had no independent access to this material and the Commonwealth repeatedly withheld it throughout Petitioner's state habeas proceedings.

Claim N. Inadequate and Meaningless Appellate Review

The Court will dismiss this claim. Petitioner challenges the appellate review in his own case. His claim, however, is procedurally defaulted because he did not raise it in his petition for rehearing before the Virginia Supreme Court.

[2] The Court is aware, however, that the Supreme Court has granted review in O'Dell on this issue of whether Simmons constitutes a new rule. O'Dell v. Netherland, __S.Ct.__, 1996 WL 716301 (12/19/96.).

Claim U. Denial of the Right to a Fair Trial

The Court has ordering a hearing on a several claims dealing with trial errors. Given their nexus to this claim, the Court will deny the motion to dismiss Claim U and allow a hearing to proceed.

The Court will dismiss claims A,D,F,N, and S. An appropriate Order will follow.

UNITED STATES DISTRICT JUDGE

January 16, 1997

DATE

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TOMMY DAVID STRICKLER,

Petitioner,

v.

J.D. NETHERLAND, WARDEN,

Respondent.

Civil Action
No. 3:95CV924

FINAL ORDER

For the reasons stated in the Memorandum this day filed, and deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED that Petitioner's Motion For Summary Judgment On Claim J (Brady violation) And Claim U (denial of fair trial) is GRANTED, thereby nullifying Petitioner's convictions of September 19, 1990 and the sentences imposed thereon. Respondent's Motion for Summary Judgment is DENIED.

Let the Clerk send copies of this Order and accompanying Memorandum to all counsel of record.

/s/ Richard L. Williams

OCT 15 1997

UNITED STATES DISTRICT JUDGE

DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
OCT 15 1997
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

TOMMY DAVID STRICKLER,

Petitioner,

v.

J.D. NETHERLAND, WARDEN,

Respondent.

Civil Action
No. 3:95CV924

MEMORANDUM OPINION

The crime giving rise to the instant proceedings occurred on January 5, 1990. The evidence at trial, in a brief summary, was as follows:

The victim, Leanne Whitlock, a young woman, while driving a friend's automobile, had driven to a shopping mall in Harrisonburg, Virginia at approximately 6:45 p.m. While the vehicle was stopped, a man ran from the shopping section of the mall and forced his way into the vehicle which the victim was operating. She drove off an sounded blasts of the horn while the intruder struck her repeatedly. She stopped the vehicle, and a second man, accompanied by a blond-haired woman, allegedly entered the car. Ms. Whitlock drove the car away, and her nude body was discovered five or six days later.

The issue before the Court deals primarily with the predicate

acts leading to the death sentence rendered against the Petitioner.

By agreement of Counsel for the Petitioner and Counsel for the Respondent, the issue of ineffective counsel, as contended in Claim B of the Amended Petition, has been withdrawn, leaving for the Court's determination, on the agreed pleadings, the claims in Claims J and U described in the following paragraphs.

On September 19, 1990, the Circuit Court of Augusta County found Tommy David Strickler guilty of the capital murder of Leanne Whitlock. Pursuant to 28 U.S.C. § 2254, Strickler filed a Petition and an Amended Petition seeking a Writ of Habeas Corpus against Respondent J.D. Netherland, Warden of Mecklenberg Prison. The matter comes before the Court on the cross-motions of Petitioner and Respondent for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The motions have been fully briefed by the parties and are ripe for decision.

BACKGROUND

Charges against Strickler were first brought in Rockingham County in January 1990, and the case was later transferred to Augusta County when a capital indictment was returned in April, 1990. Strickler was tried by a jury before the Circuit Court of Augusta County (J. Wood) and found guilty of capital murder, robbery, and abduction. On June 21, 1990, the jury recommended

two life terms on the robbery and abduction charges and death for the capital murder charge. On September 19, 1990, the judge followed the recommendation of the jury sentence in the sentencing hearing.

By Orders dated December 10, 1996 and January 16, 1997, for reasons set out in Memoranda of the same dates, the Court granted Strickler an evidentiary hearing on Claim B alleging ineffective assistance of trial counsel, on Claim J alleging that the Commonwealth withheld exculpatory and impeachment material ("Brady" material) on a chief prosecution witness, Ann Stoltzfus, and on Claim U alleging that the cumulative effect of constitutional errors at trial violated Strickler's right to a fair trial.

STANDARD

II. SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment. Summary judgment is appropriate only when the Court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); Allstate Fin. Corp. v. Financorp, Inc., 934 F.2d 55, 58 (4th Cir. 1991). The

moving party has the initial burden of establishing the absence of a genuine issue of fact.[1] Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In determining whether the moving party has satisfied its burden, the Court considers all inferences drawn from the underlying facts in the light most favorable to the party opposing the motion, and resolves all reasonable doubts against the moving party. Anderson, 477 U.S. at 255; Ballinger v. North Carolina Agric. Extension Serv., 815 F.2d 1001, 1004 (4th Cir. 1987).

Once the movant has met this burden, and a properly supported motion is before the Court, the non-moving party must set forth specific facts showing that there is a genuine issue for trial in order to defeat the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Allstate,

[1] "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson, 477 U.S. at 248. "Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice." Ross Communications v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985). Where no genuine issue of material fact exists, the Fourth Circuit has imposed an obligation on the trial judge "to prevent 'factually unsupported claims and defenses' from proceeding to trial." Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987).

934 F.2d at 58. Summary judgment is proper if, based on the evidence, "a reasonable jury could [not] return a verdict for the non-moving party." Anderson, 477 U.S. at 248; Allstate, 934 F.2d at 58.

ANALYSIS

Pursuant to a subpoena obtained by Petitioner to develop his federal habeas case, Strickler obtained copies of Detective Claytor's notes and interview reports as well as copies of materials sent to the Detective by Anne Stoltzfus. Early in the investigation, Claytor conducted several interviews with Stoltzfus. Claytor took notes of those interviews, prepared formal reports of the interviews, and received letters and notes from Stoltzfus. See Claytor's Response (4/22/97), Attachment 1 to Motion for Summary Judgment. These materials are referred to herein as "the Stoltzfus materials."[2] Stoltzfus subsequently testified at Strickler's June 1990 trial that she had witnessed the abduction of the victim, Whitlock, from a Harrisonburg shopping mall. According to the prosecutor, Stoltzfus was the only eyewitness to the alleged abduction.

[2] The documents at issue ("the Stoltzfus materials") are attached as Exhibits 1-8 to the affidavits of William Bobbitt and Humes Franklin filed with Petitioner's Summary Judgment Motion.

Exculpatory and Impeachment Material in the Stoltzfus Materials

The notes, letters, and interviews of Stoltzfus contradicted or impeached her trial testimony in many crucial respects. In her first police interview on January 19, 1990, Stoltzfus could not identify the black woman that she said she saw in the car at the time of the alleged abduction, and Stoltzfus provided no description of the woman's clothing. Ex. 1. Det. Claytor's handwritten report states that Stoltzfus could not identify the black female, but this fact is omitted from his subsequent typed report. On January 25, 1990, Stoltzfus wrote a note to Det. Claytor stating that she had spent "several hours with John Dean [the victim's boyfriend] looking at current photos from which I made the identification." Ex. 6. After viewing Dean's photos, she was able to identify Whitlock, and by the time of trial that identification had been expanded considerably. Stoltzfus described Whitlock as appearing to be "a rich college kid," "singing" and "happy." Transcript of June 18 - 21, 1990 Trial ("Tr.") 483. Stoltzfus described the clothing Whitlock was wearing. These inconsistencies were extremely material for cross-examination.

When interviewed by the police on January 19 and 22, 1990, Stoltzfus "was not sure she could identify the white males but

felt sure she could identify the white female" who had been with them at the mall. Ex. 2. According to Det. Claytor's typed report, when Stoltzfus was shown a photo array, she could not positively identify Strickler but stated only that he "resembled" one of the men she had seen. Stoltzfus stated that his hair color was not right. Ex. 2. She suggested that she might be able to make a positive identification if she saw Strickler in person. This directly contradicted her trial testimony that she was "one hundred percent sure" when she made her identification of Strickler from the photographs. Tr. 501. Stoltzfus was also unable to make a positive identification of Henderson (said to have been with Strickler at the time of the alleged abduction) from the photo spread. At trial, Stoltzfus testified that she was certain of her identifications of both Strickler and Henderson but was unable to identify the white woman with them. However, her initial interviews appear to have been contradictory to this testimony.

In the January 19 and 22 interviews with Det. Claytor, Stoltzfus gave no description of Strickler's clothing and stated only that Henderson wore a cream colored jacket. In later letters to Claytor and in her trial testimony, she provided detailed descriptions of Strickler's clothing. Ex. 7, 8. She

also gave a detailed description of the physical features and clothing of the white woman allegedly accompanying them. Ex. 7.

Stoltzfus sent Det. Claytor a letter dated January 22, 1990, just three days after her first interview. Ex. 4. In that letter she indicates that she initially had no memory of being at the mall on January 5, 1990:

> I want to clarify some of my confusion for you. First of all, I tend to remember things in pictures rather than in over-all logical constructs. When I didn't remember any Mall purchases, I didn't remember being there. But my 14-year-old daughter Katie remembers different things and her sharing with me what she remembers helped me job my memory.

Not only does this letter provide impeachment material, it provides a basis for which Stoltzfus's testimony might have been excluded altogether. She admits that she did not recall being at the mall on January 5, but that her "memory" of these events was based on what her daughter told her. Moreover, the letter indicates that Stoltzfus gave Det. Claytor information that never appeared in any of his notes, i.e., that she had not remembered being at the mall on the night Whitlock was allegedly abducted. This information, at a minimum, would likely have been extremely valuable in attacking her credibility with the jury, if counsel were not successful in actually barring her testimony altogether.

Claytor's handwritten notes of January 19, 1990 contain no

mention of Stoltzfus's described encounter with Strickler and Henderson in a music store in the mall. Ex. 1. The typed report states only that Stoltzfus may have seen the same blond haired man and a white woman inside the mall. The woman, according to the report, bumped into Stoltzfus, and the man had been yelling at the woman and appeared agitated. Ex. 2. Again Stoltzfus's subsequent letters present a detailed description of her alleged encounter in a music store with Strickler and Henderson. Stoltzfus subsequently gave this testimony at trial. In the January 22 letter, Stoltzfus stated she was uncertain that the man she saw in the mall was even the same man that she later testified she saw approach Whitlock's car. ex. 4. Stoltzfus was also very uncertain of what she "saw" in the parking lot, in direct contrast to her trial testimony:

> I have a very vague memory that I'm not sure of. It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. I have impressions of intense anger, of his going back to where the dark haired guy and girl were standing. Then the guy I saw came running up to the black girl's window? Were those 2 memories the same person?

(emphasis added). The letter continues:

> I'm sorry my initial times were so far off. First I remembered it being dark and remembered driving on past Leggetts and not going in. I placed the time around 9:00 pm thinking I must have not gone in because the Mall was closing. Later I thought I hadn't gone into the Mall

because I made no purchases. Katie remembered the small Centerpoint purchase and I knew that if that happened January 5 I could trace our path from there.

(emphasis added). Once again Stoltzfus appeared to have admitted that she had not remembered being in the mall that night. Her "memory" appears to be based on what her daughter had told her.

A letter dated January 26, 1990, to Det. Claytor provides further impeachment material. Ex. 7. Stoltzfus wrote:

> Thank you for your patience with my sometimes muddled memories. I know if I believed at the time that I was witnessing a crime I would have much, much more vivid memories. I really didn't believe that's what I saw until I saw Leanne's pictures. In fact, I'm not sure that if Kim Davis hadn't called the police and that other detective hadn't come to JMU and asked me to come in and talk to you, I never would have made any of the associations that you helped me make.

(emphasis added). Stoltzfus' memory of the events to which she testified appears to be muddled at best. Strickler likely could have utilized that in an effort to convince the jury that Stoltzfus' story was concocted with the assistance of the police, after viewing the evidence and photographs, after hearing discussions of the crime on campus, and perhaps influenced by the pervasive news coverage of Whitlock's murder. As the Supreme Court has noted, the evolution of a witness' description over a period of time can be fatal to its reliability. See Kyles v. Whitley, 514 U.S. 419, 444 (1995).

A plethora of additional impeachment material is contained in the Stoltzfus materials which is not set forth here. The Court has discussed herein several of the documents that appear to be genuinely in dispute (Exhibits 2, 7, and 8) because it is necessary to refer to them to point out contradictions with Stoltzfus' other statements in the documents about which there is no genuine material dispute (Exhibits 1 and 3-6). However, even if the three documents that are in dispute were provided to Strickler's trial counsel, the other five documents that are not in dispute in the Court's view are sufficient to constitute a Brady violation and support the instant motion for summary judgment. The five documents containing the Stoltzfus' letters and notes to Det. Claytor provided potentially devastating impeachment material, casting doubt on her testimony.

Materiality of the Stoltzfus Materials

Respondent argues unsuccessfully that the suppressed documents were not "material" under Brady and therefore, the prosecutor had no obligation to disclose them to defense counsel. The Commonwealth's Attorney's argument on summation at Strickler's trial refutes this. The prosecutor argued that Stoltzfus' testimony established both the abduction predicate and the armed robbery predicate for the capital murder count:

> First of all, Leanne Whitlock was abducted. There is absolutely no question about that. Ms. Stolzfus [sic] says that she was right behind Leanne's car when this "Mountain Man" who she identified as the defendant came out, forcibly opened the car door, jumped in, fought with Leanne, slapping her, hitting her a few times and then drove off with Ms. Whitlock. She was brought here to Augusta County where she was detailed, where she was taken by abduction. Absolutely no issue about that.

Tr. at 794.

* * *

> And we are lucky enough to have an eyewitness who saw what happened out there in that parking lot. A lot of cases you don't. A lot of cases you can just theorize what happened in the actual abduction. But Ms. Stoltzfus was there, she saw what happened.

Tr. at 799. The Commonwealth's Attorney then repeated Stoltzfus' testimony in detail. (Tr. 799-801). He argued to the jury based on Stoltzfus' testimony that Strickler had a knife and that he held it against Whitlock as she drove out of the mall:

> [Whitlock] looked at [Stoltzfus] and then looked down again. Why was that? I suggest to you that this man had a knife. He had the knife that he carries with him al the time. He had a knife later on with him in the car. <u>That was pressed right up against Leanne.</u> ... Ms. Stolzfus [sic] positively identified Mr. Strickler as the man who first got into the car. The man who struck Leanne Whitlock both times, the man that sat right beside her when she was forced to drive off. It was him, the evidence shows it was him.

Tr. 800-01 (emphasis added).

Stoltzfus described Strickler alone as committing violent acts against Whitlock-- he forced his way into her car and struck her repeatedly. In this way, the Commonwealth's Attorney used

Stoltzfus to prove that Strickler was the instigator and leader in Whitlock's abduction and, by inference, in her murder. No other witness placed Strickler in the vicinity of Whitlock, her car, or the parking lot during the time period in which Whitlock was believed to have been at the mall. Despite widespread publicity about Whitlock's case, no other witness came forward to report the very public events that Stoltzfus claims to have witnessed. Stoltzfus was the critical witness on the abduction count.

Likewise, no other witness saw Strickler with a knife or any other weapon when at the mall. Stoltzfus herself never testified that Strickler had a knife when he was in the mall or allegedly in the car with Whitlock. That inference was provided by the prosecutor based on Stoltzfus' claim that Whitlock looked down while Strickler sat beside her in the car. Again, Stoltzfus was the critical witness for the armed robbery predicate based on what she "observed" in the parking lot. Thus, as the Commonwealth's Attorney recognized, Stoltzfus's testimony played a central role in Strickler's conviction and portrayed Strickler, rather than Henderson, as the leader and instigator in the violent abduction and robbery. Without Stoltzfus' testimony, which appears likely to be less certain than she portrayed, the

jury may well have been reduced to speculation concerning these events and concerning the role played by Strickler. The jury could have found Henderson as the leader and instigator instead of Strickler.

Respondent relies on evidence that Strickler had Whitlock's car and possessions sometime after Stoltzfus "witnessed" the alleged abduction and armed robbery to establish that the suppressed Brady materials could not undermine confidence in the outcome of the trial. This argument ignores substantial evidence that could have led a jury to believe that Henderson, rather than Strickler, was the ring-leader in Whitlock's abduction, robbery, and death. Henderson's clothes had blood on them that night. Henderson had property belonging to Whitlock and gave her watch to a woman, Simmons, while at a restaurant known as Dice's Inn. Tr. 541. Henderson left Dice's Inn driving Whitlock's car. Henderson's wallet was found in the vicinity of Whitlock's body and was possibly lost during his struggle with her. Significantly, Henderson confessed to a friend on the night of the murder that he had just killed an unidentified black person and that friend observed blood on Henderson's jeans.[1] Thus,

[1]At Henderson's trial, the Commonwealth called this friend as its own witness to establish Henderson's guilt.

Stoltzfus' testimony was not irrelevant to Strickler's conviction as Respondent maintains.

Without Stoltzfus' testimony, the jury could have concluded that Henderson was responsible for the abduction, robbery, and murder, and that Strickler was an accessory after the fact or a principal in the second degree but not a principal in the first degree to capital murder. The court had charged the jury on the offense of first degree murder. Conviction of a lesser offense was a reasonable probability if defense counsel had been given the Stoltzfus materials. Given that Stoltzfus initially did not even remember being at the mall on the night Whitlock was abducted, was later unsure whether the man she saw in the mall was the same one who approached Whitlock's car, and the large amount of impeachment material contained in the Stoltzfus materials, Strickler has satisfied the materiality requirement under Brady and Kyles. The undisclosed evidence "put[s] the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 435 (1995). As Kyles emphasized, materiality does not require proof that the defendant would be acquitted or that the evidence was insufficient absent the Brady violation. A reasonable probability of conviction on a lesser count satisfies the Brady standard.

Respondent's Duty to Disclose the Stoltzfus Materials

Exculpatory and impeachment material that is in the possession and control of the state must be disclosed to the defendant prior to trial. See generally, Kyles v. Whitley, 514 U.S. 419 (1995); Giglio v. United States, 405 U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963). Respondent fails to offer a single piece of evidence to rebut Strickler's contention that his trial counsel was never provided with Exhibits 1, 3, 4, 5, and 6. Instead, Respondent argues that under Brady, the Commonwealth is required to disclose only evidence that is not available to the defense from other sources, either directly or through diligent investigation. See Barnes v. Thompson, 58 F.3d 971, 975-77 (4th Cir. 1995), cert. denied, 116 S. Ct. 4351 (1995). Respondent claims that there is no Brady violation if the information lies in a source where a reasonable defendant would have looked, Barnes, 58 F.3d at 975, and argues that the extent of Strickler's investigation at trial is an unresolved factual issue. Respondent further states that the Stoltzfus materials were available to Strickler because he had notice shortly before the June 1990 trial that Stoltzfus would be a witness.

The Court disagrees. Even though the identity of the

witness was known to the defendant before trial, the Stoltzfus materials were not available to the defense because they were not in a public file until subpoenaed during federal habeas proceedings. See Kyles v. Whitley, 514 U.S. 419 (1995) (holding that prosecutor violated Brady and noting that investigatory interviews are not available to defendant, even when names of witnesses and their testimony are known to defense); United States v. Kelly, 35 F.3d 929 (4th Cir. 1994) (reversing conviction and ordering new trial where impeachment material was not in public file and rejecting argument that evidence was available to defense with reasonable diligence).

Respondent's Failure To Disclose the Stoltzfus Materials

Augusta Commonwealth's Attorney Ervin prosecuted Strickler. Ervin had an open file policy such that Strickler's trial counsel, William E. Bobbitt, Jr., had full access to the prosecution's files. Both Bobbitt and co-defendant Henderson's defense counsel, Humes Franklin, have submitted affidavits stating that none of the Stoltzfus materials were in the prosecutor's open files which both defense attorneys reviewed in preparing their respective cases, and that they were not aware of the existence of these materials until 1997. See Bobbitt Affidavit (8/19/97), Attachment 2 to Petitioner's Motion For

Summary Judgment; Franklin Affidavit (9/5/97), Attachment 3 to Petitioner's Reply To The Warden's Response In Opposition To Strickler's Motion For Summary Judgment.

Of the eight Exhibits that comprise the Stoltzfus materials, Commonwealth Attorney Ervin only recalls reviewing Exhibits 2, 7, and 8 before Strickler's trial. He states that those three documents were in his open prosecution file and thus were accessible to defense counsel. However, Ervin does not remember reviewing Exhibits 1 or 3-6 prior to or during Strickler's trial. See Ervin Affidavit, Attachment 6 to Petitioner's Supplemental Memorandum In Further Support Of His Motion For Summary Judgment. Detective Claytor states via affidavit that he recalls distributing his typed report, Exhibit 2, to the Rockingham prosecutor but does not recall distributing any of the other materials prior to or during Strickler's trial. He only recalls producing those documents in response to the subpoena requested by Strickler's current federal habeas counsel. It appears that Strickler's trial counsel, his co-defendant Henderson's trial counsel, and the prosecutor all saw Exhibits 1 and 3-6 for the first time when Det. Claytor produced them from his private files to comply with the federal subpoena.

Respondent produced no evidence that Strickler was provided

with Exhibits 1 or 3-6 of the Stoltzfus materials until four working days before the scheduled evidentiary hearing and several weeks after briefing on the cross-motions for summary judgment had been completed, at which time Respondent submitted a one paragraph affidavit by Bobbitt's co-counsel, Thomas E. Roberts, and a newspaper article. Roberts states by affidavit that he cannot recall seeing any of the Stoltzfus materials, but remembers the information contained in them. He further states that he remembers "discussing with Bobbitt the possibility that Ms. Stoltzfus may not be a creditable witness because she had not come forward immediately and her story had become much more detailed over time." Roberts Affidavit.

The Court is somewhat skeptical about the accuracy of Roberts affidavit statements. The prosecutor, lead defense counsel for Strickler, and lead defense counsel for co-defendant Henderson all stated by affidavit that they did not see Exhibits 1 or 3-6 of the Stoltzfus materials before or during their respective trials. Roberts has failed to account for how he, unlike all the other participants in these trials, became aware of the plethora of information and impeachment material contained in the Stoltzfus documents. If Roberts was aware of the information contained in the Stoltzfus documents, one wonders why

he and Bobbitt would have chosen not to use such powerful impeachment material on cross-examination to cast doubt on the credibility of Stoltzfus, a crucial witness for the Commonwealth.

Despite the Court's skepticism regarding the accuracy of Roberts' affidavit statements, the Court nonetheless accepts Roberts' recollections as accurate and true for the purposes of summary judgment. Even accepting Roberts' statements as accurate and truthful, they are much too vague and insufficient to create a genuine dispute that Exhibits 1, 3, 4, 5, and 6 of the Stoltzfus materials were disclosed to defense counsel in light of all of the evidence to the contrary provided by Strickler and cited herein. The only specific details Mr. Roberts recalls as impeaching Stoltzfus' testimony is that her story evolved over time and that she had not come forward immediately. Those details are but a portion of the contradictions and discrepancies found within the Stoltzfus materials which have been recounted only in part herein.

The Respondent also submitted a newspaper article from the "Roanoke Times & World-News" dated Sunday, June 17, 1990, the day before Strickler's trial began, and contends that this article contains all of the facts that Strickler claims were wrongfully withheld from him in violation of Brady. The Court disagrees

with Respondent. This article does include some information that was also included in the Stoltzfus materials. For example, the article states that the individual interviewed, who appears to be Stoltzfus, at some point looked at pictures of Whitlock with John Dean, Whitlock's boyfriend, although it is not clear from the article whether this occurred before or after Stoltzfus identified Strickler. The article has a few details that might have been helpful to Strickler if he did not already know them. Besides these few details, however, the article contains virtually none of the information contained in the Stoltzfus materials and certainly did not relieve the Commonwealth from the burden of providing the Stoltzfus materials to Strickler. Respondent has not offered evidence to show that the abundance of information in the Stoltzfus materials were provided to Strickler or would have been available to him through diligent investigation. A newspaper article which may not have been seen by defense counsel simply does not equate to a prosecutor's obligation under the law.

Thus, the evidence produced by Respondent, viewed in the light most favorable to Respondent, is insufficient to create a genuine factual dispute as to whether the Commonwealth ever provided Exhibits 1, 3, 4, 5, or 6 -- the majority of the

Stoltzfus materials -- to Strickler. The uncontradicted fact is that it had not. The Commonwealth had an affirmative duty to disclose those materials to Strickler's trial counsel because they contain exculpatory and impeachment material and are also "material" under Brady and its progeny.

CONCLUSION

Based on the materials disclosed pursuant to Court ordered discovery, the facts demonstrate that Exhibits 1 and 3-6 contained Brady material that was in the possession of the Harrisonburg police department, that the Brady material was not contained in the Augusta Commonwealth's Attorney's files, that Strickler's trial counsel reviewed the prosecutor's files pursuant to the "open file" policy, and that the relevant materials were not contained in the file. The pretrial motions and the trial transcript demonstrate the Commonwealth's Attorney's knowledge that several separate police departments and jurisdictions had been involved in the investigation of Strickler's case. The Commonwealth's Attorney called several of these officers as witnesses. He was clearly on notice that the files of these other agencies might contain material required to be disclosed to the defense attorney. Whether from good faith or bad, the effect is that these undisclosed materials were

suppressed by the prosecution and never disclosed to Strickler's trial attorney. For the foregoing reasons, the Court will DENY Respondent's motion, GRANT Petitioner's Motion for Summary Judgment on Claims J and U, thereby vacating Petitioner's conviction. An appropriate Order will enter.

OCT 15 1997

DATE

Robert E. Maxwell, J.
UNITED STATES DISTRICT JUDGE

EXHIBIT E

§ 2.1-342. **Official records to be open to inspection; procedure for requesting records and responding to request; charges; exceptions to application of chapter.** — A. Except as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens

$200, the public body may, before continuing to process the request, require the citizen requesting the information to agree to payment of an amount not to exceed the advance determination by five percent. The period within which the public body must respond under this section shall be tolled for the amount of time that elapses between notice of the advance determination and the response of the citizen requesting the information.

Official records maintained by a public body on a computer or other electronic data processing system which are available to the public under the provisions of this chapter shall be made reasonably accessible to the public at reasonable cost.

Public bodies shall not be required to create or prepare a particular requested record if it does not already exist. Public bodies may, but shall not be required to, abstract or summarize information from official records or convert an official record available in one form into another form at the request of the citizen. The public body shall make reasonable efforts to reach an agreement with the requester concerning the production of the records requested.

Failure to make any response to a request for records shall be a violation of this chapter and deemed a denial of the request.

B. The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

1. Memoranda, correspondence, evidence and complaints related to criminal investigations; adult arrestee photographs when necessary to avoid jeopardizing an investigation in felony cases until such time as the release of such photograph will no longer jeopardize the investigation; reports submitted to the state and local police, to investigators authorized pursuant to § 53.1-16 and to the campus police departments of public institutions of higher education as established by Chapter 17 (§ 23-232 et seq.) of Title 23 in confidence; portions of records of local government crime commissions that would identify individuals providing information about crimes or criminal activities under a promise of anonymity; records of local police departments relating to neighborhood watch programs that include the names, addresses, and operating schedules of individual participants in the program that are provided to such departments under a promise of confidentiality; and all records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment. Information in the custody of law-enforcement officials relative to the identity of any individual other than a juvenile who is arrested and charged, and the status of the charge or arrest, shall not be excluded from the provisions of this chapter.

Criminal incident information relating to felony offenses shall not be excluded from the provisions of this chapter; however, where the release of criminal incident information is likely to jeopardize an ongoing criminal investigation or the safety of an individual, cause a suspect to flee or evade detection, or result in the destruction of evidence, such information may be withheld until the above-referenced damage is no longer likely to occur from release of the information.

§ 8.01-654.1. Limitation on consideration of petition filed by prisoner sentenced to death. — No petition for a writ of habeas corpus filed by a prisoner held under a sentence of death shall be considered unless it is filed within sixty days after the earliest of: (i) denial by the United States Supreme Court of a petition for a writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal, (ii) a decision by the United States Supreme Court affirming imposition of the sentence of death when such decision is in a case resulting from a granted writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal, or(iii) the expiration of the period for filing a timely petition for certiorari without a petition being filed.

However, notwithstanding the time restrictions otherwise applicable to the filing of a petition for a writ of habeas corpus, an indigent prisoner may file such a petition within 120 days following appointment, made under § 19.2-163.7, of counsel to represent him. (1995, c. 503; 1998, c. 199.)

§ 8.01-654. When and by whom writ granted; what petition to contain. — A. The writ of habeas corpus ad subjiciendum shall be granted forthwith by any circuit court, to any person who shall apply for the same by petition, showing by affidavits or other evidence probable cause to believe that he is detained without lawful authority.

B. 1. With respect to any such petition filed by a petitioner held under criminal process, and subject to the provisions of § 17-97, only the circuit court which entered the original judgment order of conviction or convictions complained of in the petition shall have authority to issue writs of habeas corpus. If a district court entered the original judgment order of conviction or convictions complained of in the petition, only the circuit court for the city or county wherein the district court sits shall have authority to issue writs of habeas corpus. Hearings on such petition, where granted in the circuit court, may be held at any circuit court within the same circuit as the circuit court in which the petition was filed, as designated by the judge thereof.

2. Such petition shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.

3. Such petition may allege detention without lawful authority through challenge to a conviction, although the sentence imposed for such conviction is suspended or is to be served subsequently to the sentence currently being served by petitioner.

4. In the event the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters, the court may make its determination whether such writ should issue on the basis of the record.

5. The court shall give findings of fact and conclusions of law following a determination on the record or after hearing, to be made a part of the record and transcribed.

6. If petitioner alleges as a ground for illegality of his detention the inadequacy of counsel, he shall be deemed to waive his privilege with respect to communications between such counsel and himself to the extent necessary to permit a full and fair hearing for the alleged ground. (Code 1950, § 8-596; 1958, c. 215; 1968, c. 487; 1977, c. 617; 1978, c. 124.)

§ 15.2-1722. Certain records to be kept by sheriffs and chiefs of police. — A. It shall be the duty of the sheriff or chief of police of every locality to insure, in addition to other records required by law, the maintenance of adequate personnel, arrest, investigative, reportable incidents, and noncriminal incidents records necessary for the efficient operation of a law-enforcement agency. Failure of a sheriff or a chief of police to maintain such records or failure to relinquish such records to his successor in office shall constitute a misdemeanor. Former sheriffs or chiefs of police shall be allowed access to such files for preparation of a defense in any suit or action arising from the performance of their official duties as sheriff or chief of police. The enforcement of this section shall be the duty of the attorney for the Commonwealth of the county or city wherein the violation occurs. Except for information in the custody of law-enforcement officials relative to the identity of any individual other than a juvenile who is arrested and charged, and the status of the charge of arrest, the records required to be maintained by this section shall be exempt from the provisions of Chapter 21 (§ 2.1-340 et seq.) of Title 2.1.

B. For purposes of this section, the following definitions shall apply:

"Arrest records" means a compilation of information, centrally maintained in law-enforcement custody, of any arrest or temporary detention of an individual, including the identity of the person arrested or detained, the nature of the arrest or detention, and the charge, if any.

"Investigative records" means the reports of any systematic inquiries or examinations into criminal or suspected criminal acts which have been committed, are being committed, or are about to be committed.

"Noncriminal incidents records" means compilations of noncriminal occurrences of general interest to law-enforcement agencies, such as missing persons, lost and found property, suicides and accidental deaths.

"Personnel records" means those records maintained on each and every individual employed by a law-enforcement agency which reflect personal data concerning the employee's age, length of service, amount of training, education, compensation level, and other pertinent personal information.

"Reportable incidents records" means a compilation of complaints received by a law-enforcement agency and action taken by the agency in response thereto. (1975, c. 290, § 15.1-135.1; 1979, c. 686; 1981, c. 284; 1997, c. 587.)

§ 18.2-31. Capital murder defined; punishment. — The following offenses shall constitute capital murder, punishable as a Class 1 felony:

1. The willful, deliberate, and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit;

2. The willful, deliberate, and premeditated killing of any person by another for hire;

3. The willful, deliberate, and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof;

4. The willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery while armed with a deadly weapon;

5. The willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape or forcible sodomy or attempted forcible sodomy;

6. The willful, deliberate, and premeditated killing of a law-enforcement officer as defined in § 9-169 (9) when such killing is for the purpose of interfering with the performance of his official duties;

7. The willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction;

8. The willful, deliberate, and premeditated killing of a child under the age of twelve years in the commission of abduction as defined in § 18.2-48 when such abduction was committed with the intent to extort money or a pecuniary benefit, or with the intent to defile the victim of such abduction; and

9. The willful, deliberate, and premeditated killing of any person in the commission of or attempted commission of a violation of § 18.2-248, involving a Schedule I or II controlled substance, when such killing is for the purpose of furthering the commission or attempted commission of such violation.

If any one or more subsections, sentences, or parts of this section shall be judged unconstitutional or invalid, such adjudication shall not affect, impair, or invalidate the remaining provisions thereof but shall be confined in its operation to the specific provisions so held unconstitutional or invalid. (Code 1950, §§ 18.1-21, 53-291; 1960, c. 358; 1962, c. 42; 1966, c. 300; 1970, c. 648; 1973, c. 403; 1975, cc. 14, 15; 1976, c. 503; 1977, c. 478; 1979, c. 582; 1980, c. 221; 1981, c. 607; 1982, c. 636; 1983, c. 175; 1985, c. 428; 1988, c. 550; 1989, c. 527; 1990, c. 746; 1991, c. 232.)

§ 19.2-264.2. Conditions for imposition of death sentence. — In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed. (1977, c. 492.)

Rule 3A:11. Discovery and Inspection.

(a) *Application of Rule.* — This Rule applies only to prosecution for a felony in a circuit court.

(b) *Discovery by the Accused.* — (1) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph any relevant (i) written or recorded statements or confessions made by the accused, or copies thereof, or the substance of any oral statements or confessions made by the accused to any law enforcement officer, the existence of which is known to the attorney for the Commonwealth, and (ii) written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, other scientific reports, and written reports of a physical or mental examination of the accused or the alleged victim made in connection with the particular case, or copies thereof, that are known by the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth.

(2) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph designated books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. This subparagraph does not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case, except as provided in clause (ii) of subparagraph (b)(1) of this Rule.

Rule 4:1. General Provisions Governing Discovery.

(a) *Discovery Methods.* — Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) *Scope of Discovery.* — Unless otherwise limited by order of the court in accordance with these Rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Subject to the provisions of Rule 4:8 (g), the frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice to counsel of record or pursuant to a motion under subdivision (c).

(5) Limitations on Discovery in Certain Proceedings. In any proceeding (1) for separate maintenance, divorce, or annulment of marriage, (2) for the exercise of the right of eminent domain, or (3) for a writ of habeas corpus or in the nature of coram nobis; (a) the scope of discovery shall extend only to matters which are relevant to the issues in the proceeding and which are not privileged; and (b) no discovery shall be allowed in any proceeding for a writ of habeas corpus or in the nature of coram nobis without prior leave of the court, which may deny or limit discovery in any such proceeding. In any proceeding for divorce or annulment of marriage, a notice to take depositions must be served in the Commonwealth by an officer authorized to serve the same, except that, in cases where such suits have been commenced and an appearance has been made on behalf of the defendant by counsel, notices to take depositions may be served in accordance with Rule 1:12.

CERTIFICATION

I hereby certify that two copies of the enclosed Petition For A Writ Of Certiorari were served by hand on counsel for Respondent, Pamela Rumpz, Assistant Attorney General, Office of the Attorney General, 900 E. Main Street, Richmond, VA 23219 on Sept. 1, 1998.

BARBARA L. HARTUNG

APPENDIX F

VIRGINIA:

IN THE CIRCUIT COURT OF AUGUSTA COUNTY

TOMMY DAVID STRICKLER,

Petitioner,

v. Case No. CL 92000305

EDWARD W. MURRAY, et.al.

Respondents.

MOTION TO DISMISS

Now come the respondents, by counsel, and move this Court to deny and dismiss the petition for writ of habeas corpus.

PROCEDURAL HISTORY

Petitioner is being detained pursuant to judgments of this Court dated September 19, 1990, in which he was convicted of capital murder, abduction and robbery. Based on findings of both "vileness" and "future dangerousness," he was sentenced to death for capital murder. He was sentenced to life imprisonment for each of the non-capital felonies.

The Virginia Supreme Court unanimously affirmed petitioner's capital murder conviction and death sentence on April 19, 1991. The court also unanimously affirmed the remaining felony convictions. Strickler v. Commonwealth, 241 Va. 482, 404 S.E.2d 227 (1991). Strickler's petition for a writ of certiorari to the United States Supreme Court was denied on November 4, 1991. Strickler v. Virginia, 112 S. Ct. 386 (1991).

one of those selected had formed any opinion at all. (Tr. 119 [Hickox]). See Patton v. Youn 467 U.S. 1025, 1029-1030 (1984) (defendant not denied fair trial even where 77% of veniremc admitted they would carry an opinion into the jury box, and 8 out of 14 actually seated admitte they had formed an opinion as to defendant's guilt.) The record shows that there was simpl no need for either a change of venue or a change of venire.

Claim 2

The petitioner next claims that counsel were ineffective for failing to file a motion fo exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny.[4]

From the inception of this case, the prosecutor's files were open to the petitioner's counsel. Each of the petitioner's attorneys made numerous visits to the prosecutor's offices and reviewed all the evidence the Commonwealth intended to present. Both attorneys were taken together to the crime scene, accompanied by the two prosecutors and the chief investigator, and shown the location of the evidence found there. No evidence was introduced at trial of which the petitioner's counsel had been previously unaware. (See Resp. Exh. 1, ¶ 3). Given that counsel were voluntarily given full disclosure of everything known to the government, there was no need for a formal motion. The petitioner has failed to proffer any exculpatory or favorable evidence of which trial counsel were unaware.

In addition, counsel could have made a tactical decision not to file such a motion, because it would have made reciprocal discovery available to the Commonwealth under Rule 3A:11(c) of the Rules of the Supreme Court of Virginia. Counsel thus would have been

[4]Counsel did file a Motion for a Bill of Particulars, parts of which were denied on the grounds that the material requested was actually "discovery." (Tr. 7-8, 14, 18-21).

required to disclose any highly prejudicial information then known to them, e.g., the report of Dr. Warren. (See Resp. Exh. 6). Because the decision to forego a formal discovery motion could have been the result of reasonable trial strategy, the petitioner cannot show ineffectiveness under Strickland, 466 U.S. at 689; Darden, 477 U.S. at 186. Nor, when counsel in fact obtained all the information to which they were entitled under Brady, can he show prejudice. This claim must therefore be denied and dismissed.

Claims 3 and 4

In these two claims, the petitioner alleges that counsel were ineffective for failing to question the venire about their racial attitudes in order to determine whether the veniremen would be inclined to impose the death penalty:

(a) to atone for the racism of whites and the past oppression of blacks (Claim 3), and

(b) to help equalize the imposition of death sentences for white and black defendants. (Claim 4).

In preparing for trial, counsel discussed and considered whether to ask the veniremen about possible racial bias. They chose not to make such inquiry for sound tactical reasons. They did not want to emphasize the fact that the victim was black and the petitioner was white because they did not want to either imply that the veniremen were biased, thereby alienating them, or to inadvertently suggest that the most severe punishment was appropriate because the crime was interracial. They could not conclude with any certainty what effect such questions

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APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

TOMMY DAVID STRICKLER Petitioner, v. J.D. NETHERLAND, Warden Respondent.	)	Case No. 3:95-CV-924

CITY OF STAUNTON
COUNTY OF AUGUSTA

AFFIDAVIT OF WILLIAM E. BOBBITT, JR.

William E. Bobbitt, Jr., being duly sworn, states as follows:

1. I am the Public Defender for Augusta and Rockbridge Counties and the cities of Staunton, Waynesboro, and Buena Vista. In that capacity, I was assigned to represent Tommy David Strickler in his capital murder trial in Augusta County.

2. The jury trial was conducted in June, 1990, in Augusta County. I was assisted by Thomas E. Roberts, then a part-time Assistant Public Defender.

3. Prior to trial, I reviewed the materials in the files of the Commonwealth's Attorney for Augusta County. The prosecutor had an open file policy, and I had access to these files on more than one occasion. I was permitted to make copies of any materials.

4. I have reviewed the attached Exhibits 1-7 consisting of Det. Claytor's notes of interviews with Ann Stoltzfus and letters and notes from Ann Stoltzfus to Det. Claytor.

5. I have no recollection of seeing any of this material in the Commonwealth's files during my pretrial review of the files or at any time during trial. I have reviewed my own files from the case, and I do not have copies of any of the material contained in Exhibits 1-7.

6. I have reviewed my cross-examination of Anne Stoltzfus during Strickler's trial. My cross-examination questions do not rely on any of the materials in these exhibits. I conclude that none of these materials were in the Commonwealth's files when I examined them.

7. I first learned these materials existed when they were shown to me sometime in 1997.

8. The material in Exhibits 1-7 provides powerful impeachment material and should have been disclosed to me pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and Kyles v. Whitley, 115 S. Ct. 1555 (1995). If I had known these materials existed, I would have used them on cross-examination.

9. Anne Stoltzfus testified that she was an eyewitness to the abduction of Whitlock by Strickler and Henderson. Her testimony provided evidence against Strickler on both the abduction and robbery predicates to the capital murder charge. Thus, she was a critical witness.

10. The notes, letters and interviews of Anne

Stoltzfus contradicted or impeached her trial testimony in a number of respects.

11. In her first police interview on January 19, 1990, Stoltzfus could not identify the black woman in the car at the mall, and Stoltzfus provided no description of her clothing. Ex. 1. Det. Claytor's handwritten report states that Stoltzfus could not identify the black female, but this is omitted from his subsequent typed report. On January 25, 1990, Stoltzfus wrote a note to Det. Claytor stating that she had spent "several hours with John Dean [Whitlock's boyfriend] looking at current photos from which I made the identification." Ex. 6. After viewing Dean's photos, she was able to identify Whitlock, and by the time of trial that identification had been expanded considerably. Stoltzfus described Whitlock as "a rich college kid," "singing" and happy. Stoltzfus described the clothing she was wearing. These inconsistencies were material for cross-examination.

12. When interviewed by the police on January 19 and 22, 1990, Stoltzfus "was not sure she could identify the white males but felt sure she could identify the white female" who had been with them at the mall. Ex. 2. According to Det. Claytor's typed report, when Stoltzfus was shown a photo array, she could not positively identify Stickler but stated only that he "resembled" one of the men she had seen. Stoltzfus stated that his hair color was not right. Ex. 2. She suggested that she might be able to make a positive identification if she saw Strickler in person. This directly contradicted her trial

testimony that she was "one hundred percent sure" when she made her identification of Strickler from the photographs. Tr. 478-49. Stoltzfus was also unable to make a positive identification of Henderson from the photo spread. At trial, Stoltzfus testified that she was certain of her identifications of both Strickler and Henderson but was unable to identify the white woman with them. However, her initial interviews stated the opposite.

13. In the January 19 and 22 interviews with Det. Claytor, Stoltzfus gave no description of Strickler's clothing and stated only that Henderson wore a cream colored jacket. In later letters to Claytor and in her trial testimony, she provided detailed descriptions of Strickler's clothing. Ex. 7, 8. She also gave a detailed description of the physical features and clothing of the white woman accompanying them. Ex. 7.

14. Stoltzfus sent Det. Claytor a letter dated January 22, 1990, just three days after her first interview. Ex. 4. In that letter she indicates that she initially had no memory of being at the mall on January 5, 1990:

> I want to clarify some of my confusion for you. First of to all, I tend to remember things in pictures rather than in over-all logical constructs. When I didn't remember any Mall purchases, I didn't remember being there. But my 14-year-old daughter Katie remembers different things and her sharing with me what she remembers helped me jog my memory.

Not only does this letter provide reams of impeachment material, it provides a basis to exclude Stoltzfus's testimony altogether. She admits that she did not recall being at the mall on January

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Not only does this letter provide reams of impeachment material, it provides a basis to exclude Stoltzfus's testimony altogether. She admits that she did not recall being at the mall on January

5, but that her "memory" of these events was based on what her daughter told her. Moreover, the letter indicates that Stoltzfus gave Det. Claytor information that never appeared in any of his notes, i.e., she had not remembered being at the mall on the night Whitlock was allegedly abducted. This information would have been very effective in destroying her credibility with the jury.

15. Claytor's handwritten notes of January 19, 1990, contain no mention of Stoltzfus's encounter with Strickler and Henderson in the music store. Ex. 1. The typed report states only that Stoltzfus may have seen the same blond haired man and white women inside the mall. The woman bumped into Stoltzfus, and the man had been yelling at the woman and appeared agitated. Ex. 2. Again Stoltzfus's subsequent letters present a detailed description of her encounter in a music store with Strickler and Henderson. Stoltzfus later gave this testimony at trial. In the January 22 letter, Stoltzfus states she is uncertain that the man she saw in the mall is even the same man that she later saw approach Whitlock's car. Ex. 4. Stoltzfus was also very uncertain of what she "saw" in the parking lot, in direct contrast to her trial testimony:

> I have a very vague memory that I'm not sure of. It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. I have impressions of intense anger, of his going back to where the dark haired guy and girl were standing. Then the guy I saw came running up to the black girl's window? Were those 2 memories the same person?

(Emphasis added.)

e letter continues:

> I'm sorry my initial times were so far off. First I remembered it being dark and remembered driving on past Leggetts and not going in. I placed the time around 9:00 pm thinking I must have not gone in because the Mall was closing. Later I thought I hadn't gone into the Mall because I made no purchases. Katie remembered the small Centerpoint purchase and I knew that if that happened January 5 I could trace our path from there.

(Emphasis added.) Once again Stoltzfus admits that she had not remembered being in the mall that night. Her "memory" is based on what her daughter has told her. Stoltzfus's letters and notes to Det. Claytor provided devastating impeachment material, casting doubt on all of her testimony.

16. There are additional inconsistencies. In Stoltzfus's first police interview, Whitlock's car was described as "dark blue" with West Virginia tags. In notes labled "Observations" dated January 19, 1990, and illustrated with diagrams, the car is described as a "dark blue, 'new' sports car West Va. tags." Ex. 3.

17. On January 24, 1990, a police report indicates that Stoltzfus was taken to the police impound lot to view the car. Ex. 2. After viewing the car, she was able to recall the license number, NKA-243, and other details about the car.

18. The letter dated January 26, 1990, to Det. Claytor provides further impeachment material. Ex. 7. Stoltzfus wrote:

> Thank you for your patience with my sometimes muddled memories. I know if I believed at the time that I was witnessing a crime I would have much, much more vivid memories. I really didn't believe that's what I saw until I saw Leanne's pictures. In fact, I'm sure that if Kim Davis hadn't called the police and that other detective hadn't come to JMU and asked me to come in

and talk to you, I never would have made any of the [illegible] associations that you helped me make.

(Emphasis added.) Stoltzfus did not remember the events that sh[illegible] testified about. Her story was apparently developed with the assistance of the police, after viewing the evidence and photographs, and after hearing discussions of the crime on campus.

19. Additional impeachment material is contained in [illegible] Exhibits 1-7 which is not set forth here.

20. In sum, the suppressed documents satisfy the requirements of Brady and Kyles for there is a "reasonable probability" that disclosure would lead to a different result as shown by whether suppression of the evidence "undermines confidence in the outcome of the trial." Kyles, at 1566, quoting Bagley, 473 U.S. at 678. Stoltzfus was a critical alleged "eyewitness" on both the abduction and robbery predicates. The [illegible] materials should have been disclosed to Strickler's trial counsel.

Further, affiant sayeth not.

William E. Bobbitt, Jr.

Sworn to before me this
19th the day of August, 1997:

Linda H. Majer, Notary Public
My Commission expires: July 31, 2001.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

TOMMY DAVID STRICKLER Petitioner, v. J.D. NETHERLAND, Warden Respondent.	)	Case No. 3:95-CV-924

CITY OF WAYNESBORO, VIRGINIA

AFFIDAVIT OF HUMES J. FRANKLIN, JR.

Humes J. Franklin, Jr., being duly sworn, states as follows:

1. I am an attorney, admitted to the Bar of Virginia, and my office is located at 129 N. Wayne Avenue, Waynesboro, Va.

2. In 1990, I was assigned to represent Ronald Lee Henderson in his capital murder trial. Henderson had been charged along with Tommy Strickler in the abduction, robbery and murder of Leeann Whitlock. The indictment was brought in Augusta County and subsequently transferred on defendant's motion to the Circuit Court for the City of Winchester.

3. The jury trial was conducted in March, 1991, before Judge Bumgardner. Henderson was convicted of first degree murder and sentenced to life imprisonment. The prosecutor was A. Lee Ervin, Commonwealth's Attorney for Augusta County. Ervin had prosecuted Strickler in 1990, and Strickler was convicted of capital murder and sentenced to death.

4. On February 7, 1991, I filed a Motion For Discovery And Inspection requesting in relevant part, "Any statements allegedly made by any person which show or tend to show any information within the knowledge of possession of the Commonwealth which tends to be exculpatory, mitigating, or otherwise favorable to the defendant," id. at ¶ B.1., as well as "Any and all other records and/or information which arguably could be helpful or useful to the defense in impeaching or otherwise detracting from the probative force of the Commonwealth's evidence or which arguably could lead to such records or information," id. at ¶ 10.

5. The Commonwealth filed an Objection To Defendant's Motion For Discovery And Inspection on March 5, 1991. In response to B.1, the Commonwealth agreed "to provide any exculpatory evidence that it may have knowledge of." As to 10, the Commonwealth agreed to provide "any exculpatory evidence that is within the knowledge of the Commonwealth's Attorney."

6. On March 20, 1991, the trial court entered an Order directing in relevant part that the Commonwealth's Attorney "provide all exculpatory evidence that he has knowledge of to [Henderson]."

7. Pursuant to that Order and the Commonwealth's consent, I reviewed the materials in the files of the Commonwealth's Attorney for Augusta County prior to Henderson's trial. I had access to these files on more than one occasion, and I was permitted to make copies of any materials.

8. I have reviewed the attached Exhibits 1-8 consisting of Det. Claytor's notes of interviews with Ann Stoltzfus and letters and notes from Ann Stoltzfus to Det. Claytor.

9. I have no recollection of seeing any of this material in the Commonwealth's files during my pretrial review of the files or at any time during trial. I have reviewed my own files from the case, and I ~~do~~ could not ~~have~~ find copies of any of the material contained in Exhibits 1-8.

10. I have reviewed my cross-examination of Anne Stoltzfus during Henderson's trial. Exhibit 9. My cross-examination questions do not rely on any of the materials in these exhibits. I ~~conclude~~ must presume that none of these materials were in the Commonwealth's files when I examined them.

11. To the best of my knowledge / I first learned these materials existed when they were shown to me sometime in 1997.

12. The material in Exhibits 1-8 provides powerful impeachment material and should have been disclosed to me pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and Kyles v. Whitley, 115 S. Ct. 1555 (1995). If I had known these materials existed, I would have used them on cross-examination.

13. Anne Stoltzfus testified that she was an eyewitness to the abduction of Whitlock by Strickler and Henderson. Her testimony provided evidence against Strickler and Henderson on both the abduction and robbery predicates to the capital murder charge. Thus, she was a critical witness.

14. I believe The notes, letters and interviews of Anne Stoltzfus contradicted or impeached her trial testimony in many significant respects. The ~~undisclosed~~ materials also provided a basis to bar her testimony altogether since Stoltzfus stated that her "memories" were based on conversations with her daughter. Had I known of these materials, I would have made a motion in limine to prohibit Stoltzfus' testimony.

15. The ~~suppressed~~ documents satisfy the requirements of Brady and Kyles for there is a "reasonable probability" that disclosure would lead to a different result as shown by whether ~~suppression~~ undisclosure of the evidence "undermines confidence in the outcome of the trial." Kyles, at 1566, quoting Bagley, 473 U.S. at 678. Stoltzfus was a critical alleged "eyewitness" on both the abduction and robbery predicates. The materials should have been disclosed to me as Henderson's trial counsel.

Further, affiant sayeth not.

Humes J. Franklin, Jr.

Sworn to before me this
5th the day of September, 1997:

Ellen P Hunsard

My commission expires on: 9/30/99